

# WHY CAN'T PROPERTY TRANSFERS RESOLVE AN ESTABLISHMENT CLAUSE PROBLEM? THE DIVIDE BETWEEN THE NINTH AND SEVENTH CIRCUITS AFTER *BUONO V. KEMPTHORNE*

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## INTRODUCTION

A white cross sits atop a large rock on the Mojave National Preserve in San Bernardino County, California. Controversy over the cross's presence on federal land began in 1999 as an alleged violation of the Establishment Clause<sup>1</sup>—legislation and litigation ensued soon after.<sup>2</sup> The Ninth Circuit recently ruled in *Buono v. Kempthorne (Buono IV)*<sup>3</sup> that a proposed transfer of the property surrounding the cross violated a 2002 district court injunction barring the display of the cross on federal property.<sup>4</sup> Under this transfer proposal, a local chapter of the Veterans of Foreign Wars (VFW) would assume ownership of the cross, which it erected decades earlier as a war memorial.<sup>5</sup> In the court's view, the property transfer did not cure the Establishment Clause violation because the cross would still appear to be located on government property, and the transfer was perceived as an attempt to skirt the injunction.<sup>6</sup> The Ninth Circuit's determination that the *Buono* cross violated the Establishment Clause, and the accompanying injunction, has had its critics, including Justice Clarence Thomas: "If a cross in the middle of a desert establishes a religion, then no religious observance is safe from challenge."<sup>7</sup>

The Establishment Clause in the First Amendment to the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion."<sup>8</sup> Legal commentators have varied opinions on what it means to have a law that

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1. U.S. CONST. amend. I, cl. 1.

2. *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1072-74 (9th Cir. 2007), *opinion amended and superseded on denial of reh'g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

3. *Id.* at 1069.

4. *Id.* at 1071. A rehearing *en banc* was denied on May 14, 2008, though several judges criticized the substance of the *Buono IV* opinion. *Buono v. Kempthorne (Buono V)*, 527 F.3d 758, 759-68 (9th Cir. 2008) (O'Scannlain, J., dissenting), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

5. *Buono IV*, 502 F.3d at 1072, 1074.

6. *Id.* at 1085-86.

7. *Van Orden v. Perry*, 545 U.S. 677, 695 (2005) (Thomas, J., concurring).

8. U.S. CONST. amend. I, cl. 1.

establishes a religion. Some believe that this clause barred establishment of a national religion,<sup>9</sup> while others characterize it as requiring a “wall of separation between church and State.”<sup>10</sup> In a 2005 Supreme Court case, *Van Orden v. Perry*,<sup>11</sup> Chief Justice Rehnquist admitted in several parts of the majority opinion that the Establishment Clause jurisprudence was muddled.<sup>12</sup>

The *Buono IV* ruling adds to this confusion. That decision is in direct conflict with a 2005 decision by the Seventh Circuit, *Mercier v. Fraternal Order of Eagles*,<sup>13</sup> which ruled that transfer of a piece of property around a Ten Commandments memorial to a private organization was not a violation of the Establishment Clause.<sup>14</sup> Both decisions indicate a tension between the courts’ handling of cases involving the sale of property containing religious monuments to private parties to solve an Establishment Clause violation. Furthermore, it begs the question of whether a government agency can only remedy such a violation by removing the religious symbol.

This Note analyzes the reasoning applied by the Ninth Circuit in *Buono IV* and contrasts it with the Seventh Circuit’s treatment of similar legal issues in *Freedom from Religion Foundation, Inc. v. City of Marshfield (Marshfield)*<sup>15</sup> and *Mercier*. Part I of this Note provides an overview of Establishment Clause cases from the Supreme Court, Ninth Circuit, and Seventh Circuit. These cases, especially *Marshfield* and *Mercier*, form the backdrop for evaluating *Buono IV* which are explained in greater detail. Part II describes the legislative and

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9. “[I]t must be concluded that the establishment clause of the first amendment . . . was not intended to prevent any government aid to religion but was intended rather to prevent the establishment of a national religion.” Harold J. Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 EMORY L.J. 777, 785 (1986).

10. *Reynolds v. United States*, 98 U.S. 145, 164 (1878). The term “wall of separation” is attributed to Thomas Jefferson. See Berman, *supra* note 9, at 783 n.22. Chief Justice Burger once stated that “we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: ‘sponsorship, financial support, and active involvement of the sovereign in religious activity.’” *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970)). Justice Thomas stated that evidence of government “coercion [to adopt a given religion should be] the touchstone for our Establishment Clause inquiry. Every acknowledgement of religion would not give rise to an Establishment Clause claim.” *Van Orden*, 545 U.S. at 697 (Thomas, J., concurring). Justice Thomas also believed that using coercion as the primary inquiry would make Supreme Court precedent “capable of consistent and coherent application.” *Id.*

11. 545 U.S. 677 (2005).

12. Chief Justice Rehnquist described the Supreme Court’s line of cases in this area of the law as “Januslike,” *id.* at 683, and listed the Court’s inconsistent application of legal tests such as the *Lemon* test as evidence that the Establishment Clause presents a complex legal issue. *Id.* at 685-86.

13. 395 F.3d 693 (7th Cir. 2005).

14. *Id.* at 702.

15. 203 F.3d 487 (7th Cir. 2000).

procedural background of *Buono IV* and the three previous *Buono* cases.<sup>16</sup> Part III outlines the district court and the Ninth Circuit's treatment of the property transfer issue in *Buono v. Norton (Buono III)*<sup>17</sup> and *Buono IV* and applies various legal tests to the *Buono* cases to determine that the proper outcome was not reached.

### I. OVERVIEW OF KEY ESTABLISHMENT CLAUSE CASES

Although the Ninth Circuit ruled differently in *Buono IV* than the Seventh Circuit did in *Marshfield* and *Mercier*, these rely on some of the same cases. *Lemon v. Kurtzman*,<sup>18</sup> a key Supreme Court case discussing the Establishment Clause, set out a test used by courts for over thirty years to analyze potential violations of the Establishment Clause.<sup>19</sup> Even though the *Lemon* test is often used, two other tests, the "endorsement test"<sup>20</sup> and the "reasonable observer test,"<sup>21</sup> emerged from concurring opinions by Justice O'Connor in *Lynch v. Donnelly*<sup>22</sup> and *Capitol Square Review & Advisory Board v. Pinette*.<sup>23</sup> These tests are not necessarily independent, but are sometimes used in conjunction with the *Lemon* test.<sup>24</sup> *Van Orden*, a 2005 Supreme Court case, provides an alternative to *Lemon* test when evaluating monuments.<sup>25</sup> These cases supply part of the backdrop for the Ninth Circuit's decision in *Buono IV*.

The Seventh Circuit provided a framework in *Marshfield* and *Mercier* that the Ninth Circuit employed in its *Buono IV* analysis, though the court ultimately came to an opposite conclusion.<sup>26</sup> The different result is due in part to Ninth Circuit precedent, most notably *Separation of Church and State Committee v. City of Eugene (SCSC)*,<sup>27</sup> which in the words of the Ninth Circuit, "squarely

16. *Buono v. Norton (Buono I)*, 212 F. Supp. 2d 1202 (C.D. Cal. 2002), *aff'd*, 371 F.3d 543 (9th Cir. 2004); *Buono v. Norton (Buono II)*, 371 F.3d 543 (9th Cir. 2004); *Buono v. Norton (Buono III)*, 364 F. Supp. 2d 1175 (C.D. Cal. 2005), *aff'd sub nom. Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069 (9th Cir. 2007), *amended and superseded on denial of reh'g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

17. 364 F. Supp. 2d 1175 (C.D. Cal. 2005).

18. 403 U.S. 602 (1971).

19. *Id.* at 612-13.

20. *See Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

21. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780-81 (1995) (O'Connor, J., concurring).

22. 465 U.S. 668 (1984).

23. 515 U.S. 753 (1995).

24. *See Buono v. Norton (Buono II)*, 371 F.3d 543, 550 (9th Cir. 2004).

25. *Van Orden v. Perry*, 545 U.S. 677, 686 (2005).

26. *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1081-86 (9th Cir. 2007), *amended and superseded on denial of reh'g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

27. 93 F.3d 617 (9th Cir. 1996) (*per curiam*).

controlled” the *Buono* cases.<sup>28</sup>

### A. Supreme Court Precedent

1. *Lemon v. Kurtzman*.—The central issue in *Lemon* was whether state aid to non-public schools within Rhode Island and Pennsylvania violated the Establishment Clause.<sup>29</sup> A plurality of the Court held that both states’ practices were unconstitutional.<sup>30</sup> Chief Justice Burger, writing for the plurality, “gleaned” three tests through “consideration of the cumulative criteria developed by the Court over many years.”<sup>31</sup> These three analyses are: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion[;] finally, the statute must not foster ‘an excessive government entanglement with religion.’”<sup>32</sup>

The Court has applied this test inconsistently,<sup>33</sup> and two years after the Court outlined the *Lemon* test, it described its factors as “no more than helpful signposts.”<sup>34</sup> Regardless of the Supreme Court’s wavering adherence to the *Lemon* test, both the Seventh and Ninth Circuits continue to use this analysis.<sup>35</sup>

2. *Lynch v. Donnelly*.—The controversy in *Lynch* involved a nativity scene in a municipal Christmas display.<sup>36</sup> A majority of the Court overruled a lower court determination that this display violated the Establishment Clause.<sup>37</sup> In her concurrence, Justice O’Connor attempted to clarify Establishment Clause doctrine<sup>38</sup> by reformulating parts of the *Lemon* test into an “endorsement test”: “The purpose prong of the *Lemon* test asks whether government’s actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.”<sup>39</sup> Justice O’Connor further

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28. See *Buono II*, 371 F.3d at 548; see also *Buono IV*, 502 F.3d at 1075.

29. *Lemon v. Kurtzman*, 403 U.S. 602, 606 (1971).

30. *Id.* at 607.

31. *Id.* at 612.

32. *Id.* at 612-13 (citation omitted) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

33. Compare *Wallace v. Jaffree*, 472 U.S. 38, 55-60 (1985) (applying *Lemon* test), with *Marsh v. Chambers*, 463 U.S. 783, 792-95 (1983) (not applying *Lemon* test). See also Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 499-505 (2002) (describing the “demise” of the *Lemon* test even though it has never been overruled).

34. *Hunt v. McNair*, 413 U.S. 734, 741 (1973). One commentator states that the Supreme Court has “implicitly abandoned” the *Lemon* test. Choper, *supra* note 33, at 499.

35. See, e.g., *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 704-05 (7th Cir. 2005); *Buono v. Norton (Buono II)*, 371 F.3d 543, 548-50 (9th Cir. 2004); *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 493-94, (7th Cir. 2000).

36. *Lynch v. Donnelly*, 465 U.S. 668, 670-71 (1984).

37. *Id.* at 672.

38. *Id.* at 687 (O’Connor, J., concurring).

39. *Id.* at 690.

explained the danger of government endorsement of religion: “Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”<sup>40</sup> While the endorsement test came from a concurring opinion, subsequent Supreme Court opinions have treated it favorably.<sup>41</sup>

3. *Capitol Square Review & Advisory Board v. Pinnette*.—The *Capitol Square* case concerned a state board’s denial of the Ku Klux Klan’s application to display a large cross on a 10-acre plaza owned by the state of Ohio.<sup>42</sup> A majority of the Justices agreed that denial of the application was unconstitutional because it infringed upon private religious speech.<sup>43</sup> A minority of the Court stated that an Establishment Clause violation does not exist when private religious speech takes place in a public forum.<sup>44</sup>

The Court also disagreed about how to characterize a “reasonable observer.”<sup>45</sup> In a concurring opinion, Justice O’Connor explained that “the endorsement test necessarily focuses upon the perception of a reasonable, informed observer.”<sup>46</sup> This reasonable observer “in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears.”<sup>47</sup> The reasonable observer inquiry focuses on the perceptions of a hypothetical reasonable observer within the community, not whether a particular individual is offended by a government practice.<sup>48</sup>

4. *Van Orden v. Perry*.—*Van Orden* involved a Ten Commandments monument installed on the Texas State Capitol grounds in 1961 by the Fraternal Order of Eagles.<sup>49</sup> This monument was one of seventeen on the twenty-two acre grounds.<sup>50</sup> This case established a different standard than the *Lemon* test for evaluating the religious implications of the presence of a monument. According to the plurality in *Van Orden*, the *Lemon* test is “not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation’s

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40. *Id.* at 688.

41. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 594-97 (1989); *see also Choper, supra* note 33, at 504-08.

42. *Capitol Square Review & Advisory Bd. v. Pinnette*, 515 U.S. 753, 757-58 (1995).

43. *Id.* at 760-61. Before the review board denied the Ku Klux Klan’s application, it approved display of a Christmas tree and menorah. *Id.* at 758.

44. *Id.* at 770. This is characterized as a per se rule by the Seventh Circuit in *Marshfield Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 493-94 (7th Cir. 2000).

45. *Capitol Square*, 515 U.S. at 772-73. (O’Connor, J., concurring).

46. *Id.* at 773.

47. *Id.* at 780.

48. *Id.* at 779-80.

49. *Van Orden v. Perry*, 545 U.S. 677, 681-82 (2005).

50. *Id.* at 681.

history.”<sup>51</sup> While this case did not address the transfer of property, it is instructive as a recent Supreme Court case discussing the Establishment Clause.

*B. Important Ninth Circuit Precedent:  
Separation of Church and State v. City of Eugene (SCSC)*

In evaluating the cross under the effect prong of the *Lemon* test in *Buono v. Norton (Buono II)*,<sup>52</sup> the Ninth Circuit extensively compared the *Buono* cross to the cross at issue in *Separation of Church and State Committee v. City of Eugene (SCSC)*.<sup>53</sup> *SCSC* involved a fifty-one-foot-tall cross designated as a war memorial when it was deeded to the city of Eugene, Oregon.<sup>54</sup> The memorial designation occurred several years after its construction in response to litigation.<sup>55</sup> In *SCSC* the Ninth Circuit held that the cross was a symbol of Christianity and violated the Establishment Clause because “the cross may reasonably be perceived as [a] governmental endorsement of Christianity.”<sup>56</sup> The Ninth Circuit urged that *SCSC* “squarely controlled” the *Buono* case; thus, it played a central role in the court’s analysis of the *Buono* cross.<sup>57</sup>

*C. The Seventh Circuit’s Approach in Marshfield and Mercier*

Similar to the *Buono* cases, *Marshfield* and *Mercier* dealt with religious symbols or monuments on government property.<sup>58</sup> In *Marshfield*, the Seventh Circuit created an “unusual circumstances” analysis to address cases in which a government entity attempts to transfer a religious monument to a private party in order to address an Establishment Clause violation.<sup>59</sup> The court stated: “Absent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion . . . . [W]e look to the substance of the transaction as well as its form to determine whether government action endorsing religion has actually ceased.”<sup>60</sup> Interestingly, the Ninth Circuit used this analytic framework to assess the transfer of the *Buono* cross to a private

51. *Id.* at 686.

52. 371 F.3d 543 (9th Cir. 2004).

53. *Id.* at 548-49 (9th Cir. 2004) (citing *Separation of Church & State Comm. v. City of Eugene (SCSC)*, 93 F.3d 617 (9th Cir. 1996) (per curiam)).

54. *SCSC*, 93 F.3d at 618.

55. *Id.*

56. *Id.* at 620.

57. *Buono II*, 371 F.3d at 548. *Accord* *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1075 (9th Cir. 2007), *amended and superseded on denial of reh’g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom.* *Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

58. *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 489 (7th Cir. 2000) (Jesus statue); *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 694 (7th Cir. 2005) (Ten Commandments monument).

59. *Marshfield*, 203 F.3d at 491.

60. *Id.*

organization.<sup>61</sup>

1. *Facts of Marshfield*.—In *Marshfield*, legal controversy surrounded a fifteen-foot-tall statue of Jesus Christ donated by the Knights of Columbus to Marshfield in 1959.<sup>62</sup> Thirty-nine years later in 1998, the City sold the statue to a private memorial fund in response to a lawsuit alleging that the statue's presence in a public park was a violation of the Establishment Clause.<sup>63</sup>

2. *The "Unusual Circumstances" Analysis*.—The "unusual circumstances" analysis arose out of a line of "public function" cases that concerned continued government involvement despite transfer of public land to private parties as illustrated by "a set of unusual facts and circumstances."<sup>64</sup> One of these cases focused on by the Seventh Circuit was *Evans v. Newton*.<sup>65</sup> *Evans* involved a tract of land that a testator left to the city of Macon, Georgia, for the purposes of having a park that could only be used by white people.<sup>66</sup> Macon honored the testator's wishes for decades until the city determined that because the park was a public facility it was not legal to segregate it based on race.<sup>67</sup> Once Macon agreed to desegregate the park, several parties sued to enforce the discriminatory covenants and to have Macon officials removed as trustees for the park.<sup>68</sup> A lower court allowed the trustees to be replaced and transferred ownership of the park to a private group.<sup>69</sup> However, the Supreme Court ruled that transferring ownership to a private trustee did not change the perception of the park as a public place because the tradition of municipal control was "firmly established."<sup>70</sup> The park's public function made it subject to the requirements of the Fourteenth Amendment.<sup>71</sup>

In *Marshfield*, the Seventh Circuit distinguished *Evans* and other public function cases because government involvement with the Jesus statue ceased once the property was transferred to a private party.<sup>72</sup> The usefulness of the public function cases was tied to the level of government involvement: "[T]hese cases remain relevant only if we find continuing and excessive involvement between the government and private citizens."<sup>73</sup>

3. *Factors That Demonstrate Unusual Circumstances*.—Several factors can

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61. *Buono IV*, 502 F.3d at 1081-85.

62. *Marshfield*, 203 F.3d at 489.

63. *Id.* at 489-90.

64. *Id.* at 492. *See, e.g.*, *Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946).

65. 382 U.S. 296 (1966).

66. *Id.* at 297.

67. *Id.*

68. *Id.* at 297-98.

69. *Id.* at 298.

70. *Id.* at 301.

71. *Id.* at 302.

72. *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 492 (7th Cir. 2000).

73. *Id.*

be used to determine whether the government involvement is excessive, inappropriate, or continued. These factors include the nature of the sale, whether a fair market price is paid, and whether the purchaser has “assumed the traditional duties of ownership.”<sup>74</sup> The court in *Marshfield* found that the transfer of the Jesus statue and surrounding land was proper even though alternate bids were not sought and the City imposed a restrictive covenant on the deed that limited the use of the property to “public park purposes.”<sup>75</sup>

4. *Application of the Lemon Test in Marshfield.*—The next part of the court’s analysis involved use of the three-part *Lemon* test to determine whether the statue’s placement within the public park was a continuing endorsement of religion.<sup>76</sup> In regards to the secular purpose prong, the court readily admitted that it was difficult to find a secular purpose to the Jesus statue other than beautification of the park, which was frankly weak in comparison to the prominent religious message.<sup>77</sup>

Discussion of the effect prong of the *Lemon* test included a consideration of the public nature of the park.<sup>78</sup> Using reasoning from a minority of the justices in *Capitol Square*, the court evaluated the park using a “*per se* rule that the government has not violated the Establishment Clause by providing a public forum where religious speech is conducted by purely private parties, so long as the forum is open to all on equal terms.”<sup>79</sup>

The court also evaluated the statue using the “endorsement test” from Justice O’Connor’s concurrence in *Lynch v. Donnelly*.<sup>80</sup> While the Jesus statue and a small parcel of land surrounding it were privately owned, the court still treated the parcel as a public forum due to its location within a public park.<sup>81</sup> However, the court also considered the statue an expression of private religious speech.<sup>82</sup>

Ultimately, the Seventh Circuit held that the sale itself was not a government act that endorsed religion.<sup>83</sup> Under either the *Capitol Square* *per se* rule or from the perspective of a reasonable observer in the traditional endorsement test, the court determined that “the present layout of the park invite[d] a perception of a

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74. *Id.*

75. *Id.* at 492-93. The court added that “the fact that a covenant exists will not affect the validity of the transfer. . . . [S]uch action [to enforce the covenant] would relate to the conduct of the parties following the sale of the property, so at this time, we need not address whether such action would constitute . . . [a] violation of the Establishment Clause.” *Id.*

76. *Id.* at 493-96. For the *Lemon* test prongs, see *supra* text accompanying note 32.

77. *Id.* at 493.

78. *Id.* at 493-94.

79. *Id.* (citing *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995)). For background on *Capitol Square*, see *supra* text accompanying notes 42-48.

80. “Under this test, ‘[t]he effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys the message of endorsement or disapproval.’” *Id.* at 493 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring)).

81. *Marshfield*, 203 F.3d at 494.

82. *Id.* at 495.

83. *Id.* at 497.

government endorsement of religion.”<sup>84</sup> The court noted that there was no physical differentiation or visual boundary to inform visitors that the statue was privately owned and to distinguish it from the surrounding park land, which had the effect of giving the statue preferential treatment.<sup>85</sup> The case was remanded to the district court to come up with a “narrowly tailored” remedy because the holding above “limit[ed] private speech in a public forum.”<sup>86</sup> The court did not order the statue removed, but suggested that

should the City (on City property) construct some defining structure, such as a permanent gated fence or wall, to separate City property from Fund property accompanied by a clearly visible disclaimer, . . . we doubt that a reasonable person would confuse speech made on Fund property with expressive endorsement made by the City.<sup>87</sup>

On remand, the district court determined that a four-foot-tall iron fence with two large disclaimer signs cured the perception of the city endorsing religion.<sup>88</sup>

5. *Application of the “Unusual Circumstances” Analysis to Mercier.*—In *Mercier*, the religious symbol at issue was a Ten Commandments monument.<sup>89</sup> Similar to the situation in *Marshfield*, the city of La Crosse, Wisconsin, negotiated a sale of the monument in response to a suit over the monument’s presence in a downtown park.<sup>90</sup> After several offers from different groups to move the monument were rejected, the City decided to sell the monument to the local Fraternal Order of Eagles, which had donated the monument in June 1965.<sup>91</sup> The monument was also dedicated to high school students who volunteered during a serious flood in La Crosse during the spring of 1965.<sup>92</sup> Likely in response to *Marshfield*, the City erected a fence around the monument, along with a sign noting that this monument was a private park and not an endorsement of religion.<sup>93</sup> The suit continued, and the district court ruled that the monument was a violation of the Establishment Clause, which the sale did not cure, and further that the sale itself was an independent violation of the Establishment

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84. *Id.* at 496.

85. *Id.*

86. *Id.* at 497.

87. *Id.*

88. *Freedom from Religion Found., Inc. v. City of Marshfield*, No. 98-C-270-S, 2000 WL 767376, at \*1 (W.D. Wis. May 9, 2000). For a photograph of the statue, fence, and signage see Freedom From Religion Foundation, [http://www.ffrf.org/legal/images/JesusMarshfield\\_after.jpg](http://www.ffrf.org/legal/images/JesusMarshfield_after.jpg) (last visited Mar. 12, 2009). Even the primary plaintiff in the suit against Marshfield was happy with the result because he saw the fence as a “memorial to the First Amendment.” Clarence Reinders, “*We Done Good*” FREETHOUGHT TODAY, Jan./Feb. 2001, available at [http://ffrf.org/fttoday/2001/jan\\_feb01/reinders.html](http://ffrf.org/fttoday/2001/jan_feb01/reinders.html).

89. *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 694-95 (7th Cir. 2005).

90. *Id.* at 696.

91. *Id.*

92. *Id.*

93. *Id.* at 697-98.

Clause.<sup>94</sup>

In reviewing the case, the Seventh Circuit applied the “unusual circumstances” analysis from *Marshfield* and determined that none existed in the sale of the monument.<sup>95</sup> The sale of the property around the monument to the Eagles was not a sham transaction because it divested the City from any further responsibility or oversight of the property.<sup>96</sup> The sale conformed to applicable state laws.<sup>97</sup> The court did not find it unusual that only the Eagles were offered the property because they had originally given the monument to the city and their headquarters were located adjacent to the park.<sup>98</sup>

6. *Applying the Lemon Test to Mercier*.—The Seventh Circuit in *Mercier* also found that the sale of the monument satisfied the *Lemon* test, even though that test had not been constructed to analyze the sale of a religious symbol on government property.<sup>99</sup> The court evaluated whether the sale had a secular purpose (first prong) and whether the primary effect of the sale advanced or inhibited religion (second prong).<sup>100</sup> The court did not address the third prong of the *Lemon* test, whether the sale fostered an excessive entanglement with religion, because it held that the sale demonstrated disentanglement with religion.<sup>101</sup>

In reviewing the monument’s history, the court noted that while it had a religious purpose, there was also the secular purpose of honoring volunteers during the flood.<sup>102</sup> The City had a secular motive for the sale as well—avoiding litigation.<sup>103</sup> The court also rejected the argument that the City showed a preference for the monument’s religious purpose by allowing it to stay in place.<sup>104</sup> Furthermore, “[t]he desire to keep the Monument in place cannot automatically be labeled a constitutional violation. Removal is always an option, but as *Marshfield* holds, it is not a necessary solution to a First Amendment challenge.”<sup>105</sup>

In evaluating the effect prong, the court determined that “[a] reasonable person, considering the history of the monument recited above, would understand

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94. *Mercier v. City of La Crosse*, 305 F. Supp. 2d 999, 1003, 1012-14 (W.D. Wis. 2004), *rev’d sub nom. Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005).

95. *Mercier*, 395 F.3d at 702-04. The court did not evaluate whether the district court erred in granting summary judgment on the issue of the monument itself being an Establishment Clause violation because it was not challenged in the appeal. *Id.* at 699.

96. *Id.* at 703-04.

97. *Id.* at 702-03.

98. *Id.* at 703.

99. *Id.* at 704.

100. *Id.* (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).

101. *Id.* (citing *Lemon*, 403 U.S. at 612-13).

102. *Id.*

103. *Id.* at 705.

104. *Id.*

105. *Id.* at 702.

the City's desire to keep the Monument in its original location."<sup>106</sup> The sale itself did not have the primary effect of advancing or inhibiting religion because the City was trying to separate itself from any religious message while attempting to preserve the monument in its original location.<sup>107</sup> The court emphasized that the ruling from *Marshfield* dictated that these types of situations would be evaluated on a case-by-case basis<sup>108</sup> and did not mean that every sale would be automatically constitutional.<sup>109</sup>

## II. BACKGROUND AND HISTORY OF THE *BUONO* CASES

The history surrounding the *Buono* cross's site provides insight into why this cross is more than a religious symbol and therefore makes an Establishment Clause analysis more difficult. The background of the *Buono* site is key to understanding the similarities between the *Buono* cross and the religious monuments in *Marshfield* and *Mercier*. The procedural background of the *Buono* cases is also directly intertwined with congressional involvement with the site, further complicating analysis of the case.

### A. *History and Description of the Site*

The Death Valley Post of the VFW erected a white cross on Sunrise Rock as a war memorial in 1934.<sup>110</sup> The site is now part of the Mojave National Preserve (Preserve), but the VFW erected the cross sixty years before Congress created the Preserve.<sup>111</sup> This site was under the jurisdiction of the Bureau of Land Management until 1994.<sup>112</sup> The original cross was replaced several times, and the current cross dates from 1998.<sup>113</sup> Historic photographs show signs near the original cross that stated: "The Cross, Erected in Memory of the Dead of All Wars," and "Erected 1934 by Members of Veterans of Foreign [sic] Wars, Death Valley post 2884."<sup>114</sup> No signs are currently posted alongside the cross, but it is

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106. *Id.* at 705.

107. *Id.*

108. *Id.* at 702 (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000)).

109. *Id.* ("We are not endorsing a non-remedial initiative designed to sell off patches of government land to various religious denominations as a means of circumventing the Establishment Clause.")

110. *Buono v. Norton (Buono I)*, 212 F. Supp. 2d 1202, 1205 (C.D. Cal. 2002), *aff'd*, 371 F.3d 543 (9th Cir. 2004). For an undated photograph of the cross taken by the National Park Service, see National Parks Traveler, <http://www.nationalparkstraveler.com/files/storyphotos/MOJA-Sunrise%20Rock%20Cross.jpg> (last visited Mar. 12, 2009).

111. *Buono I*, 212 F. Supp. 2d at 1204-05.

112. *Id.* at 1205. It is not apparent from available sources whether the federal government owned the land in 1934 when the VFW built the cross.

113. *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1072 (9th Cir. 2007), *amended and superseded on denial of reh'g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

114. *Id.*

presumed that the originals likely deteriorated.<sup>115</sup>

The current cross is between five and eight feet tall and constructed of painted metal pipe four inches in diameter.<sup>116</sup> It is visible from a road that passes through the Preserve and from a campground near the rock.<sup>117</sup> The cross is currently bolted to the rock in order to make it difficult to remove.<sup>118</sup> There is no plaque explaining that it is a war memorial and the government has never issued permits for reconstruction of this memorial.<sup>119</sup> As early as 1935, the cross served as a site for Easter services, though these services occurred here regularly only since 1984.<sup>120</sup> The cross was arguably modeled after prominent World War I memorials such as the Argonne Cross in Arlington Cemetery.<sup>121</sup>

The cross sits on a small part of the 1.6 million-acre Preserve.<sup>122</sup> While ninety percent of the Preserve, including the area surrounding the cross, is federally owned, 86,000 acres of the Preserve are privately-owned and 43,000 acres are owned by the State of California.<sup>123</sup> Privately-owned property is located near the cross; two ranches and several corrals are two miles away.<sup>124</sup>

### B. Procedural and Legislative History of the *Buono* Cases

The *Buono* controversy represents a check and counter-check between the Ninth Circuit and Congress. Between 1999 and 2007, there have been four court decisions, including *Buono IV*, ordering removal of the cross and four Congressional responses attempting to keep the cross in place.<sup>125</sup> The most recent conflict surrounding the cross concerned the validity of section 8121 of a defense appropriations bill (section 8121) that directed the transfer of the cross property to the VFW.<sup>126</sup>

Controversy about the cross began in May 1999 after the National Park Service (NPS) received a letter requesting permission to erect a “stupa,” a dome-shaped Buddhist shrine, on a rock outcrop near the cross.<sup>127</sup> The NPS denied the

115. *Buono I*, 212 F. Supp. 2d at 1205.

116. *Id.*

117. *Id.*

118. *Buono IV*, 502 F.3d at 1072.

119. *Id.*

120. *Id.*

121. For additional discussion of the Argonne cross, see *infra* Part III.B.2. There is no explanation for why the VFW chose the cross form for the memorial.

122. *Buono I*, 212 F. Supp. 2d at 1205.

123. *Buono IV*, 502 F.3d at 1072.

124. *Buono v. Norton (Buono II)*, 371 F.3d 543, 550 (9th Cir. 2004).

125. *Buono IV*, 502 F.3d at 1073-76.

126. Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87 § 8121(a)-(f), 117 Stat. 1100 (2003) (codified at 16 U.S.C. § 410aaa-56 (2006)).

127. *Buono I*, 212 F. Supp. 2d at 1205-06. The letter was sent by a “long-time acquaintance” of the plaintiff, *Buono*, which begs the question of whether the letter was sent in order to trigger litigation. *Id.* at 1206.

request, citing a federal regulation prohibiting installation of a memorial without its authorization, and added in a hand-written note that it intended to remove the cross as well.<sup>128</sup> In October 1999, the American Civil Liberties Union (ACLU) sent the NPS a letter expressing concern over the existence of the cross on federal land and threatening legal action if it was not removed.<sup>129</sup> The ACLU did not give the NPS a deadline to remove the cross, but the NPS was then confronted with how to remove the cross in the face of local opposition.<sup>130</sup> In August 2000, the ACLU contacted the NPS again and stated that it would sue unless the cross was removed within sixty days.<sup>131</sup> Under threat of litigation, the NPS decided to remove the cross and subsequently contacted private citizens “believed to be responsible for maintaining the cross.”<sup>132</sup> These individuals declined to remove the cross voluntarily and admitted that they would replace it if it was removed by the NPS.<sup>133</sup>

The NPS’s decision to remove the cross prompted a county supervisor to contact Congressman Jerry Lewis (R-CA) with concerns about the removal of the “veteran’s memorial.”<sup>134</sup> What followed was the first of several congressional actions to save the cross. In December 2000, Congress passed the Consolidated Appropriations Act, a part of which stated that no government funds could be used to remove the cross. This effectively barred the NPS from following through with its plans to remove it.<sup>135</sup> The NPS did not remove the cross, and in March 2001, Frank Buono filed suit against the Secretary of the Interior, the Regional Director of NPS, and the Preserve’s Superintendent.<sup>136</sup> Buono, a former NPS employee at the Preserve and a Roman Catholic, claimed he was offended that a religious symbol was on federal land.<sup>137</sup>

While this initial suit was pending in the District Court for the Central District of California, Congress passed its second bill related to the cross.

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128. *Buono IV*, 502 F.3d at 1072-73. The regulation referred to in the letter states: “The installation of a monument, memorial, tablet, structure, or other commemorative installation in a park area without the authorization of the Director [of the NPS] is prohibited.” 36 C.F.R. § 2.62(a) (2008).

129. *Buono I*, 212 F. Supp. 2d at 1206.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* Congressman Jerry Lewis is the representative for the 41st congressional district of California. About Jerry Lewis, <http://www.house.gov/jerrylewis/bio.html> (last visited Mar. 12, 2009).

135. *Buono v. Norton (Buono II)*, 371 F.3d 543, 549 (9th Cir. 2004); see also Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 133, 114 Stat. 2763 (2000).

136. *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1073 (9th Cir. 2007), *amended and superseded on denial of reh’g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

137. *Buono I*, 212 F. Supp. 2d at 1207. While the ALCU is not a named plaintiff in this case, the ALCU provided legal representation for Buono. *Id.* at 1203.

Congress designated the cross as the “White Cross World War I Memorial” in January 2002<sup>138</sup> and directed the NPS to use funds for the Preserve to “acquire a replica of the original memorial plaque and cross.”<sup>139</sup> In July 2002, the district court ruled that the cross’s presence on federal land was a violation of the Establishment Clause because it failed the “effect prong” of the three-part *Lemon* test.<sup>140</sup> The court reasoned that the primary effect of the cross memorial was to advance religion.<sup>141</sup>

The district court in *Buono I* viewed the cross first and foremost as a religious symbol and determined that its origins as a war memorial did not “shield it from constitutional scrutiny.”<sup>142</sup> Once the court decided that the effect prong of the *Lemon* test was not satisfied, it did not proceed to analyze the cross’s existence under the other two prongs.<sup>143</sup> The court granted *Buono*’s motion for summary judgment<sup>144</sup> and permanently enjoined the NPS from “permitting the display of the Latin cross” on Sunrise Rock in the Preserve.<sup>145</sup>

Several months later in October 2002, Congress responded to the district court’s decision by including a provision in a defense appropriations bill forbidding the use of federal funds “to dismantle national memorials commemorating United States participation in World War I.”<sup>146</sup> After a motion to alter, amend, and stay the district court’s judgment was denied,<sup>147</sup> the NPS filed an appeal in December 2002 to the Ninth Circuit.<sup>148</sup> While the appeal was

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138. Department of Defense and Emergency Supplemental Appropriations For Recovery From and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, § 8137(a), 115 Stat. 2230, 2278 (2002) (codified at 16 U.S.C. § 431 (2006)) (added to note listing national memorials). Congressman Lewis was chairman of the Defense Appropriations Subcommittee from 1999-2005, which explains how funds earmarked for the cross ended up in a defense bill. About Jerry Lewis, <http://www.house.gov/jerrylewis/bio.html> (last visited Mar. 12, 2009).

139. § 8137(c), 115 Stat. at 2278-79.

140. *Buono I*, 212 F. Supp. 2d at 1214-16. For additional discussion of the *Lemon* test, see *supra* Part I.A.1.

141. *Id.* at 1214-17 (citing *Lemon*, 403 U.S. at 612-13).

142. *Id.* at 1215 n.8. See also *Separation of Church & State Comm. v. City of Eugene (SCSC)*, 93 F.3d 617, 618 (9th Cir. 1996) (*per curiam*) (large cross designated as war memorial after its construction violated Establishment Clause). For more information on *SCSC*, see *supra* text accompanying notes 53-56.

143. *Buono I*, 212 F. Supp. 2d at 1215.

144. *Id.* at 1217.

145. *Buono v. Norton (Buono III)*, 364 F. Supp. 2d 1175, 1177 (C.D. Cal. 2005), *aff’d sub nom. Buono v. Kempthorne*, 502 F.3d 1069, 1071 (9th Cir. 2007) (quoting injunction order), *amended and superseded on denial of reh’g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

146. Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248 § 8065(b), 116 Stat. 1519, 1551 (2002). This was Congress’ third act in relation to the cross.

147. Docket at 61, *Buono I*, 212 F. Supp. 2d 1202 (C.D. Cal. 2002) (No. 5:01-CV-00216). Though this motion was denied, the court granted the defendants’ motion to stay judgment. *Id.*

148. Docket at 71, *Buono I*, 212 F. Supp. 2d 1202 (C.D. Cal. 2002) (No. 5:01-CV-00216).

pending, the NPS covered the cross with a tarp, and then a plywood box, in order to comply with both the injunction and the congressional acts.<sup>149</sup> The Ninth Circuit stayed the district court's injunction "to the extent that the order required the immediate removal or dismantling of the cross."<sup>150</sup>

After oral arguments were presented, but before the Ninth Circuit issued a decision, Congress enacted a fourth bill with a provision regarding the cross.<sup>151</sup> In section 8121 of a defense appropriations bill, several provisions outlined the transfer of the cross and one acre of surrounding land to the VFW in exchange for five acres of privately-owned land.<sup>152</sup> When the Ninth Circuit issued its opinion ten months after oral arguments, it upheld the injunction.<sup>153</sup> The Ninth Circuit agreed with the district court's analysis of the cross under the *Lemon* test because of the similar analysis used in *SCSC*.<sup>154</sup> Even though Congress had already passed section 8121, the court declined to decide whether the proposed land transfer detailed in that bill was a violation of the Establishment Clause.<sup>155</sup> The land transfer proposal is evidence that the NPS and Congress likely thought that a transfer, similar to the one in *Marshfield*, would cure the Establishment Clause violation.

Once the land transfer for the cross began, Buono moved to enforce or modify the injunction in order to prevent the land swap from taking place.<sup>156</sup> In 2005, the district court responded to Buono's motion by ruling that the property transfer violated the permanent injunction against displaying the cross on government land and further enjoined the NPS from implementing any of the congressional acts related to the transfer.<sup>157</sup> In ruling that the sale was not allowed, the district court applied an analytical framework from *Marshfield*, which stated that unless there were "unusual circumstances," transferring a religious display on government property to a private party would be "an effective way . . . to end its inappropriate endorsement of religion."<sup>158</sup> The

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149. *Buono III*, 364 F. Supp. 2d at 1177.

150. *Buono v. Norton (Buono II)*, 371 F.3d 543, 545 n.1 (9th Cir. 2004).

151. See Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87 § 8121(a)-(f), 117 Stat. 1054, 1100 (2003) (codified at 16 U.S.C. § 410aaa-56 (2006)).

152. § 8121(a)-(f), 117 Stat. at 1100.

153. *Buono II*, 371 F.3d at 546, 550.

154. *Id.* at 548-50 (citing *Separation of Church & State Comm. v. City of Eugene (SCSC)*, 93 F.3d 617 (9th Cir. 1996)). The cross in *SCSC* was also designated as a war memorial, but only after litigation began. *SCSC*, 93 F.3d at 618; see also *supra* text accompanying notes 53-56.

155. *Buono II*, 371 F.3d at 546 ("We express no view as to whether a transfer . . . would pass constitutional muster, but leave this question for another day.").

156. *Buono v. Norton (Buono III)*, 364 F. Supp. 2d 1175, 1176 (C.D. Cal. 2005), *aff'd sub nom. Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007), *amended and superseded on denial of reh'g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

157. *Id.* at 1182.

158. *Id.* at 1178 (quoting *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000)).

district court in *Buono III* found that unusual circumstances existed due to the abnormal nature of the transfer procedure and the reversionary property rights that the government retained once the transfer was complete.<sup>159</sup> The court also viewed NPS's transfer as an attempt to "evade" complying with the injunction's directive to stop displaying the cross.<sup>160</sup> Finding that unusual circumstances were present per *Marshfield*, the court declined to determine whether the land transfer itself was an independent violation of the Establishment Clause.<sup>161</sup>

### C. Overview of *Buono IV*

In response to the district court's ruling regarding the proposed transfer of land, the NPS appealed to the Ninth Circuit on the grounds that the incomplete transfer was not ripe for judicial review and that the Establishment Clause would not be violated by the completed transfer.<sup>162</sup> On September 6, 2007, the Ninth Circuit issued its decision upholding the district court's rulings in *Buono III*.<sup>163</sup> The court determined that pre-enforcement review of the transfer was permitted and that the transfer was ripe for review even though it was not completed.<sup>164</sup>

The Ninth Circuit focused its analysis on the NPS's continuing oversight and reversionary interest, the land transfer process, and the history of the government's actions regarding preservation of the cross.<sup>165</sup> The NPS retained a reversionary interest in the property because the land transfer stipulated that if the cross site was no longer maintained as a war memorial, ownership would automatically revert back to the government.<sup>166</sup> The land exchange was unorthodox in that typically transfers of park land involve a public hearing and open bidding.<sup>167</sup> This seemed to indicate unusual involvement or circumstances per the framework in the Seventh Circuit's *Marshfield* analysis.<sup>168</sup> The circuit court also agreed with the district court's characterization of Congress' efforts to preserve the cross as "herculean," which served as additional indicators of "unusual circumstances."<sup>169</sup> Finally, the Ninth Circuit decided that the proposed

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159. *Id.* at 1178-81.

160. *Id.* at 1182.

161. *Id.* at 1182 n.8.

162. *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1077 (9th Cir. 2007), *amended and superseded on denial of reh'g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

163. *Id.* at 1069, 1071.

164. *Id.* at 1077-81.

165. *Id.* at 1082-85.

166. *Buono v. Norton (Buono III)*, 364 F. Supp. 2d 1175, 1179 (C.D. Cal. 2005), *aff'd sub nom. Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007), *amended and superseded on denial of reh'g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

167. *Buono IV*, 502 F.3d at 1084.

168. *Id.* at 1084-85.

169. *Id.* at 1085 (citing *Buono III*, 364 F. Supp. 2d at 1182).

transfer would not end the improper government action and, therefore, would constitute a violation of the permanent injunction.<sup>170</sup>

### III. DISSECTION OF ANALYSIS OF SALE IN *BUONO III* AND *BUONO IV*

In *Buono III* and *Buono IV*, the courts used the “unusual circumstances” test from *Marshfield* to analyze the sale.<sup>171</sup> The courts’ analyses stopped there and did not apply the *Lemon* test as the Seventh Circuit did in *Marshfield* and *Mercier*.<sup>172</sup> The Ninth Circuit also failed to analyze *Buono* using reasoning from *Van Orden*, which provided yet another alternative to the *Lemon* test.<sup>173</sup> In sum, the Ninth Circuit did not apply the “unusual circumstances” framework particularly well, considering the factual similarities between *Buono* and *Mercier*. Furthermore, the holes in the Ninth Circuit’s analysis illustrate that it failed to avail itself of other tests to either properly address whether the land transfer was an independent violation of the Establishment Clause or to come up with a proper remedy.

#### A. *Why the Land Transfer Failed the Marshfield “Unusual Circumstances” Framework in Buono III and Buono IV*

In *Buono III* and *Buono IV* the courts utilized the *Marshfield* analysis and found that unusual circumstances were present because of the unorthodox method of land transfer, the continuing government oversight of the memorial, and the history of the government’s efforts to preserve the memorial.<sup>174</sup>

1. *Method of Land Transfer*.—The Secretary of the Department of the Interior is authorized by statute to exchange federal land for non-federal land under its jurisdiction.<sup>175</sup> Given that Congress “authorized [the land exchange] by a provision buried in an appropriations bill” (section 8121) and did not open it for bidding, the Ninth Circuit found unusual governmental involvement.<sup>176</sup> The Ninth Circuit also characterized the VFW as a “straw purchaser”<sup>177</sup> because a couple actively involved in efforts to maintain and preserve the cross owned the

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170. *Id.* at 1085-86.

171. *Buono IV*, 502 F.3d at 1082-86; *Buono III*, 364 F. Supp. 2d at 1178-82.

172. *Buono IV*, 502 F.3d at 1086. The Ninth Circuit referred to *Buono II* in which the court previously determined that the cross itself was an endorsement of religion, but declined to discuss whether the sale itself was an endorsement. *Id.* (citing *Buono v. Norton (Buono II)*, 371 F.3d 543, 548-50 (9th Cir. 2004)).

173. *Van Orden v. Perry*, 545 U.S. 677, 686 (2005). See *supra* Part I.A.4.

174. *Buono IV*, 502 F.3d at 1082-86; *Buono III*, 364 F. Supp. 2d at 1178-1182. For explanation of the *Marshfield* framework, see *supra* text accompanying notes 59-60, 74.

175. 16 U.S.C. § 460l-22(b) (2006).

176. *Buono IV*, 502 F.3d at 1084-85.

177. A “straw man” is defined as “3. A third party used in some transactions as a temporary transferee to allow the principal parties to accomplish something that is otherwise impermissible.” BLACK’S LAW DICTIONARY 1434 (7th ed. 1999).

private land being exchanged for the memorial.<sup>178</sup> This combination of facts led the district court and Ninth Circuit to believe that the government was attempting to “circumvent” the injunction from *Buono I*.<sup>179</sup>

In comparison to the factual situations in *Marshfield* and *Mercier*, the Ninth Circuit’s characterization of the sale seems flawed. In *Marshfield*, a group of private citizens came forward and offered to buy the Jesus statue from the city and no other bids were solicited.<sup>180</sup> In *Mercier*, the La Crosse city council voted five to three authorizing sale of the Ten Commandments monument to the Eagles, as permitted by state statute.<sup>181</sup> Even though there were other interested buyers who offered to move the monument, the Seventh Circuit did not second-guess the council’s decision to sell it to the Eagles, whose headquarters were located across the street from the monument.<sup>182</sup> The Ninth Circuit in *Buono IV* acknowledged that Congress’s actions alone were not dispositive in determining that the land transfer showed unusual circumstances; therefore, the state statute authorizing the sale of parkland in *Mercier* does not make the nature of the land transfer within that case radically different.<sup>183</sup>

Furthermore, the fact that interested parties are willing to exchange their own land in order to preserve the memorial does not automatically mean that the VFW is a straw purchaser. While the plaintiffs in *Mercier* did not contend that the Eagles were acting as a straw purchaser, the Seventh Circuit reasoned that the Eagles were a logical choice for a buyer because they had “a long-standing and important relationship with the Monument.”<sup>184</sup> Similarly, the VFW had a long relationship with the cross memorial and seemed to be the most logical purchaser of the memorial property.<sup>185</sup> As in *Mercier*, the *Buono* cross would go to a party willing to care for the memorial.<sup>186</sup>

2. *Continued Government Oversight*.—The district and circuit courts emphasized in *Buono III* and *Buono IV* that the continued oversight and involvement of the NPS with the memorial indicated that the VFW would not be taking on the traditional duties of ownership.<sup>187</sup> The district court in *Buono III*

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178. *Buono IV*, 502 F.3d at 1085.

179. *Id.*

180. *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 490 (7th Cir. 2000).

181. *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 697 (7th Cir. 2005). Sale of parkland is permissible when “no longer required for [park] purposes.” WIS. STAT. ANN. § 27.08(2)(c) (West 2004).

182. *Mercier*, 395 F.3d at 696, 703.

183. *Buono IV*, 502 F.3d at 1084.

184. *Mercier*, 395 F.3d at 703.

185. *Buono IV*, 502 F.3d at 1084. The Ninth Circuit did not find this persuasive against its belief that unusual circumstances were present. *Id.* Cf. *Mercier*, 395 F.3d at 703, 705 (describing the Eagles as the “logical purchaser” of the monument).

186. *Buono IV*, 502 F.3d at 1084-85; *Mercier*, 395 F.3d at 703.

187. *Buono IV*, 502 F.3d at 1083-84; *Buono v. Norton (Buono III)*, 364 F. Supp. 2d 1175, 1179-81 (C.D. Cal. 2005), *aff’d sub nom. Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007),

stated that the continued oversight by the NPS and sale to the VFW (outlined in section 8121) demonstrated that the “apparent endorsement of a particular religion ha[d] not actually ceased.”<sup>188</sup> Part of the NPS’s statutory duties include “supervision, management, and control” of national memorials.<sup>189</sup> Accordingly, the Ninth Circuit determined that NPS duties in relation to the memorial would remain after the transfer was completed because the cross was designated a national memorial.<sup>190</sup> Nothing in section 8121, however, stipulates that NPS continue its role as caretaker solely because the cross is a national memorial.<sup>191</sup> Not every national memorial is under government ownership. For example, Red Hill, the home of Patrick Henry, was designated a national memorial in 1986,<sup>192</sup> but it is owned and managed by a private foundation.<sup>193</sup>

While the statutory responsibilities of the NPS in relation to the memorial were important, the Ninth Circuit thought that a reversionary interest in the property outlined in section 8121 was even more indicative of the continual government control.<sup>194</sup> The transfer proposal was conditioned on the VFW’s agreement to

maintain the conveyed property as a memorial commemorating United States participation in World War I and honoring the American veterans of that war. 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.<sup>195</sup>

In regards to this reversionary interest, the Ninth Circuit stated that “it shows the government’s ongoing control over the property and that the parties will conduct themselves in the shadow of that control.”<sup>196</sup>

While the reversionary clause in section 8121 is a greater property interest than the restrictive covenant in *Marshfield*,<sup>197</sup> the reversionary clause achieves

*amended and superseded on denial of reh’g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom.* Salazar v. Buono, No. 08-472, 2009 WL 425076 (Feb. 23, 2009); *Buono IV*, 502 F.3d at 1083-84.

188. *Buono III*, 364 F. Supp. 2d at 1180.

189. 16 U.S.C. § 2 (2006).

190. *Buono IV*, 502 F.3d at 1083-84.

191. See Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87 § 8121, 117 Stat. 1054, 1100 (2003) (codified at 16 U.S.C. § 410aaa-56 (2006)).

192. 16 U.S.C. § 431 (2006) (note listing Red Hill as a national memorial in 1986).

193. S.J. Res. 187 § 2, 99th Cong., 100 Stat. 429 (1986). See generally Red Hill—The Patrick Henry National Memorial, <http://www.redhill.org/rh/memorialfoundation.htm> (last visited Mar. 19, 2009).

194. *Buono IV*, 502 F.3d at 1083-84.

195. § 8121(e), 117 Stat. at 1100.

196. *Buono IV*, 502 F.3d at 1084.

197. *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 492 (7th Cir. 2000). The restrictive covenant limited the use of the parcel to public park purposes. For discussion of the *Marshfield* facts, see *supra* Part I.C.1

a similar end of ensuring that the land be maintained for a particular purpose.<sup>198</sup> The focus of section 8121 is to transfer a war memorial, rather than a religious symbol.<sup>199</sup> The language was carefully crafted to refer to the property as a war memorial, and its cross form is not mentioned within the legislation.<sup>200</sup> If the memorial's use changed to only a religious one, then congressional intent was that the land revert back to the NPS because the memorial would no longer be maintained.<sup>201</sup>

When examining a statute, courts first examine whether the intent of Congress is clear, as evidenced by unambiguous language.<sup>202</sup> The Ninth Circuit, however, focused on a supposedly subversive and unwritten intent of this legislation—"evading" the injunction.<sup>203</sup> Throughout its opinion, the court focused on Congress's efforts to preserve or maintain "the cross," seemingly brushing aside the monument's origins as a war memorial.<sup>204</sup> However, as the government noted in its appellate brief, there is no requirement in section 8121 that the cross be displayed, so long as the property is maintained as a war memorial.<sup>205</sup>

As in *Marshfield*, it appears premature to address whether the reversionary clause is improper when the transfer has not been completed.<sup>206</sup> It is not entirely clear what would happen to the cross if it were no longer maintained as a war memorial. It could be de-listed as a national memorial, but that is not expressly provided for in section 8121. If ownership reverted back to the NPS, the NPS would likely have to comply with the injunction by not displaying the cross. This means it could be covered with a box again if the previous statute still barred the use of government funding to remove it.

Both the district court and Ninth Circuit characterized the congressional act directing the NPS to install a replica of the original memorial and plaque as an

198. § 8121(e), 117 Stat. at 1100.

199. *Id.* § 8121(a), 117 Stat. at 1100.

200. *Id.* § 8121, 117 Stat. at 1100. *See also* Brief of Appellant at 14, *Buono IV*, 502 F.3d 1069 (9th Cir. 2007), No. 05-55852.

201. This is evidenced by the language of the statute. *See* § 8121(e), 117 Stat. at 1100.

202. *See* *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 128 (1991) ("As always, we begin with the language of the statute and ask whether Congress has spoken on the subject before us. 'If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984))).

203. *Buono IV*, 502 F.3d at 1085.

204. *See, e.g., id.*

205. Brief of Appellant, *supra* note 200, at 10. This is admittedly a weak argument, but the Ninth Circuit never seemed to show any deference to Congress or Congress's intent in section 8121.

206. *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 493 (7th Cir. 2000). However, the Ninth Circuit determined that the proposed transfer was ripe for review even though it was not complete. *Buono IV*, 502 F.3d at 1077-81. This Note does not analyze the ripeness argument.

easement or license for a particular purpose.<sup>207</sup> However, that Act predated section 8121 by two years<sup>208</sup>—there is no requirement in section 8121 that the plaque installation happen after the property is transferred to the VFW.<sup>209</sup> The likely purpose of reinforcing this requirement in section 8121 was to ensure that Congress's previous directives were carried out. Additionally, the NPS was probably barred from installing the plaque while the injunction remained in force.<sup>210</sup> Ensuring continuity between separate acts of Congress regarding the same property does not indicate an unusual circumstance under the *Marshfield* analysis.

3. *History of the Government's Preservation Efforts.*—The district court in *Buono III* saw the series of congressional acts as evidence of “preserving the Latin cross” rather than the memorial.<sup>211</sup> The court repeatedly focused on the form, rather than the function of the memorial. Granted, the cross is one of the primary symbols of Christianity. There is no explanation in the court documents as to why the sign for the cross was not replaced once it deteriorated, nor is it clear how well known the cross's origins were to those who maintained it. The cross was erected as a memorial, as indicated by historical photographs.<sup>212</sup>

Furthermore, the mission statement of the organization that erected the cross demonstrates its role as a war memorial. The VFW is a non-profit “organization of war veterans committed to ensuring rights, remembering sacrifices, promoting patriotism, performing community services and advocating for a strong national defense.”<sup>213</sup> This mission statement shows that there is not a religious aim to the

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207. *Buono IV*, 502 F.3d at 1083 (citing Department of Defense and Emergency Supplemental Appropriations For Recovery From and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, § 8137(c), 115 Stat. 2230, 2278-79 (2002)). See also *Buono v. Norton (Buono III)*, 364 F. Supp. 2d 1175, 1180 (C.D. Cal. 2005), *aff'd sub nom. Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007), *amended and superseded on denial of reh'g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

208. § 8137, 115 Stat. at 2278-79.

209. Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87 § 8121(a), 117 Stat. 1054, 100 (2003) (codified at 16 U.S.C. § 410aaa-56 (2006)).

210. The injunction barred the NPS from “permitting display of the Latin cross.” *Buono IV*, 502 F.3d at 1073. While installing a plaque is technically separate from displaying the cross itself, the district court would have likely thought the plaque installation was related to permitting display of the cross.

211. *Buono III*, 364 F. Supp. 2d at 1180.

212. *But see Buono v. Norton (Buono I)*, 212 F. Supp. 2d 1202, 1215 n.8 (C.D. Cal. 2002), *aff'd*, 371 F.3d 543 (9th Cir. 2004) (listing cases where “a religious symbol's official designation as a war memorial [did] not shield it from constitutional scrutiny”).

213. VETERANS OF FOREIGN WARS, VFW AT A GLANCE I (n.d.), available at <http://www.vfw.org/resources/pdf/glance.pdf> [hereinafter VETERANS OF FOREIGN WARS]. For additional background information on the VFW, see generally BILL BOTTOMS, *THE VFW: AN ILLUSTRATED HISTORY OF THE VETERANS OF FOREIGN WARS OF THE UNITED STATES* (1991); HERBERT MOLLOY MASON, JR., *VFW: OUR FIRST CENTURY* (1999).

organization, but rather a focus on veterans and veterans' rights.<sup>214</sup> When Congress chartered the VFW in 1936, one of the organization's enumerated purposes was "to perpetuate the memory and history' of America's War dead."<sup>215</sup> The VFW played an important role in recovering soldiers' bodies after World War I, most notably participating in an expedition to northern Russia to recover eighty-six American soldiers.<sup>216</sup>

Congress's repeated efforts to save the memorial may be abnormal but they do not mean that the "substance of the transaction as well as its form" indicate government action endorsing religion.<sup>217</sup> They also do not indicate "extraordinary circumstances that justify disregarding the sale for the purposes of endorsing religion."<sup>218</sup> The court in *Marshfield* declined to find extraordinary circumstances when assessing the transfer of a Jesus statue from City ownership to private ownership.<sup>219</sup> That statue had a far weaker link to a secular purpose than the cross in *Buono* does because the Jesus statue became part of a city rest area five years after it was donated to the city.<sup>220</sup> While designation of the *Buono* cross as a national memorial happened during litigation, this was not the first time a commemorative purpose was connected to a cross movement.<sup>221</sup>

The *Buono* cross's history as a memorial is also distinguishable from the facts in a recent Supreme Court decision, *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*.<sup>222</sup> In *McCreary*, two different Kentucky counties displayed the Ten Commandments within their respective courthouses in 1999.<sup>223</sup> Shortly after the ACLU sued the counties, both counties put up expanded displays to explain that the Commandments were essentially the basis for Kentucky's laws and codes.<sup>224</sup> In spite of an injunction, the counties expanded the displays in order to show that the Ten Commandments were the basis of American government.<sup>225</sup> The Court found that the display of Ten Commandments in a courthouse had no secular purpose, other than those offered

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214. VETERANS OF FOREIGN WARS, *supra* note 213, at 1.

215. MASON, *supra* note 213, at 92, 165.

216. *Id.* at 73-77.

217. *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000).

218. *Id.* at 493.

219. *Id.* at 492-93.

220. *Id.* at 489.

221. *Cf. Murphy v. Bilbray*, 782 F. Supp 1420, 1437 (S.D. Cal. 1991), *aff'd sub nom. Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993) (discussing lack of evidence showing Mt. Soledad cross in San Diego was treated as a war memorial prior to litigation). *See generally* Jason Marques, Note, *To Bear a Cross: The Establishment Clause, Historic Preservation, and Eminent Domain Intersect at the Mt. Soledad Veterans Memorial*, 59 FLA. L. REV. 829 (2007).

222. 545 U.S. 844 (2005).

223. *Id.* at 851.

224. *Id.* at 852-53.

225. *Id.* at 854-57.

in response to litigation.<sup>226</sup> While the Supreme Court stated that it typically accepted governmental statements of purpose for religious monuments or displays, when the purpose offered is an “apparent sham, or the secular purpose secondary,” then an obvious religious purpose will still overshadow the proffered secular one in the Court’s analysis.<sup>227</sup>

### *B. Using the New Approach from Van Orden*

In 2005, the Supreme Court heard two cases concerning Ten Commandments monuments: *McCreary* and *Van Orden*.<sup>228</sup> Although the Court applied the *Lemon* test in *McCreary*,<sup>229</sup> a plurality of the Court in *Van Orden* stated that the *Lemon* test is “not useful” when assessing the “passive monument” at issue in that case.<sup>230</sup> The Ten Commandments monument in *Van Orden* differed from the one in *McCreary*; the Fraternal Order of Eagles installed it on the Texas State Capitol grounds in 1961, and there are sixteen other monuments on the twenty-two acre site.<sup>231</sup> The Court stated when considering the *Van Orden* monument, its “analysis is driven both by the nature of the monument and by our Nation’s history.”<sup>232</sup> While this case did not address the transfer of property, it is instructive as a recent Supreme Court case discussing the Establishment Clause. Furthermore, this analysis results in a better consideration of the context of a monument than the *Lemon* test. If the Ninth Circuit had availed itself of this new approach when it decided *Buono IV*, the rational conclusion would have been that the *Buono* cross and proposed transfer did not violate the Establishment Clause.

1. *Nature of the Monument.*—Discussion in the plurality opinion of *Van Orden* focused on the nature of the monument both in the context of the Ten Commandment’s use by the government, and how it was used passively in this case.<sup>233</sup> This decision was limited in scope to discussing the Ten Commandments, but it did differentiate that monument’s display from requirements that the Ten Commandments be displayed in schools.<sup>234</sup> The Texas Capitol grounds monument was passive when compared to the school display cases because in the school cases, “the text confronted elementary school students every day.”<sup>235</sup> The religious purpose of the monument in *Van Orden* was evident, but the Court affirmed the lower courts’ rulings that there was a valid secular purpose in Texas recognizing the Eagles’ (who had donated the

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226. *Id.* at 866.

227. *Id.* at 865.

228. For additional information on *Van Orden*, see *supra* Part I.A.4.

229. *McCreary*, 545 U.S. at 864-66.

230. *Van Orden*, 545 U.S. at 686.

231. *Id.* at 681-82.

232. *Id.* at 686.

233. *Id.* at 690-92.

234. *Id.* at 691-92 (citing cases where such requirements were not upheld, e.g. *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam)).

235. *Id.* at 691.

monument) efforts to fight juvenile delinquency.<sup>236</sup>

The Court would also likely see some validity in the preservation of the *Buono* cross as a war memorial. The VFW built the cross to honor dead soldiers from all wars,<sup>237</sup> though Congress designated it as a World War I memorial.<sup>238</sup> The *Buono* cross has fewer ties to the government than the *Van Orden* monument because no federal agency ever gave permission for the memorial to be built.<sup>239</sup> While the Ninth Circuit focused on the form of the memorial as a cross,<sup>240</sup> this part of the *Van Orden* analysis urges a more holistic view of a monument that looks beyond its form.

2. *Nation's History*.—The Court in *Van Orden* recognized that religion had a place in the history of the national government. The Court gleaned evidence of that history from discussions by the Framers and the presence of religious symbols throughout federal buildings and sites.<sup>241</sup> There is also evidence in American history that religious symbols were used in war memorial designs after World War I. For example, in Arlington National Cemetery, a thirteen-foot-tall marble cross honors World War I soldiers, some of whom died in the Argonne forest in France.<sup>242</sup> The Argonne Cross, erected in 1923,<sup>243</sup> by the Argonne Unit of the American Women's Legion, specifically recognizes World War I soldiers reinterred in the cemetery after being disinterred from various cemeteries in Europe.<sup>244</sup>

Another large cross commemorates fallen World War I soldiers in Arlington.<sup>245</sup> Dedicated on Armistice Day 1927, the Canadian Cross of Sacrifice honors American citizens who enlisted with the Canadian Armed Force because Canada entered World War I before the United States.<sup>246</sup> The granite cross

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236. *Id.* at 682-83.

237. *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1072 (9th Cir. 2007), *amended and superseded on denial of reh'g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

238. Department of Defense and Emergency Supplemental Appropriations For Recovery From and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, § 8137(a), 115 Stat. 2230, 2278 (2002) (codified at 16 U.S.C. § 431 (2006) (added to national memorials list)).

239. *Buono IV*, 502 F.3d at 1072.

240. *See, e.g., id.* at 1071 (The opinion begins: "A Latin cross sits atop . . .").

241. *Van Orden*, 545 U.S. at 686-89.

242. GEORGE W. DODGE, *IMAGES OF AMERICA: ARLINGTON NATIONAL CEMETERY* 68 (2006).

243. OWEN ANDREWS, *A MOMENT OF SILENCE: ARLINGTON NATIONAL CEMETERY* 60 (1994).

244. JAMES EDWARD PETERS, *ARLINGTON NATIONAL CEMETERY: SHRINE TO AMERICA'S HEROES* 247-48 (1986). The British War Graves Commission, formed after World War I, planned cemeteries for dead soldiers in other countries, and one of the key features of these cemeteries was a large "Cross of Sacrifice." GEORGE L. MOSSE, *FALLEN SOLDIERS: RESHAPING THE MEMORY OF THE WORLD WARS* 82-84 (1990). The Cross design included a sword embedded within the cross, the blade facing downward. *Id.* at 83.

245. PETERS, *supra* note 244, at 248.

246. *Id.*

stands twenty-four-feet tall and features a bronze sword embedded within the cross.<sup>247</sup> The memorial has been updated to honor additional veterans from World War II and Korea.<sup>248</sup> These two crosses, constructed in Arlington National Cemetery in the 1920s, demonstrate that this was an accepted form of commemorating soldiers.

3. *Justice Breyer's Approach: Using Legal Judgment.*—Justice Breyer concurred in judgment in *Van Orden*, but elected to rely most heavily on “legal judgment” rather than tests for this type of “borderline” case involving religious text.<sup>249</sup> Rather than looking to the nation’s history or the nature of the monument, Justice Breyer stated: “[T]o determine the message that the text [of the monument] here conveys, we must examine how the text is *used*. And that inquiry requires us to consider the context of the display.”<sup>250</sup>

One similarity between the memorials in *Buono* and *Van Orden* is their age and the length of time their presence went unquestioned.<sup>251</sup> The Ten Commandments monument in *Van Orden* was forty-four years old by the time the Supreme Court issued its decision.<sup>252</sup> Justice Breyer thought its “unchallenged” status was determinative, showing “that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion.”<sup>253</sup> Similarly, the *Buono* cross’s presence on the Preserve went undisturbed until the ACLU threatened litigation in 1999.<sup>254</sup> An observer aware of the cross’s purpose as a war memorial would arguably not consider it an example of government furthering religion.<sup>255</sup>

The context of the monument in *Van Orden* is admittedly different than the *Buono* cross memorial at Sunrise Rock. The Ten Commandments monument in *Van Orden* is part of a larger complex of diverse monuments and historical markers.<sup>256</sup> This variety also bolstered the state’s argument that this display

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247. *Id.* at 249.

248. *Id.*

249. *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring).

250. *Id.* at 701 (emphasis in original).

251. *Id.* at 702. Justice Breyer stated: “As far as I can tell, 40 years passed in which the presence of this monument, legally speaking, went unchallenged (until the single legal objection raised by petitioner).” *Id.*

252. *Id.* at 682 (plurality opinion).

253. *Id.* at 702 (Breyer, J., concurring).

254. *Buono v. Norton (Buono I)*, 212 F. Supp. 2d 1202, 1205-06 (C.D. Cal. 2002), *aff'd*, 371 F.3d 543 (9th Cir. 2004).

255. *See Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 705 (7th Cir. 2005). *Cf. Buono v. Norton (Buono II)*, 371 F.3d 543, 550 (9th Cir. 2004) (a reasonable observer aware of the cross’s history would also be aware of government attempts to save it and the exclusion of other religious symbols).

256. *Van Orden*, 545 U.S. at 681.

showed Texas's political and legal history.<sup>257</sup>

In *Buono*, the cross is by itself and not located near any government buildings. The Ninth Circuit also found meaning in the NPS not allowing a Buddhist stupa to be erected in the Preserve.<sup>258</sup> The context is much more isolated in *Buono*, and perhaps this would be enough for Justice Breyer to decide that this case is distinguishable from those at issue in *Van Orden*. In Justice Breyer's opinion, the isolated setting could make it more difficult for the government to extricate itself from the religious message attached to the cross memorial by selling it to the VFW and installing signs explaining the site's history. However, with this case now before the Supreme Court, the plurality opinion, rather than Justice Breyer's approach, would seem to indicate reversal of the Ninth Circuit's ruling in *Buono IV*.

### C. Application of the Lemon Test to the Property Transfer of the Cross

The plurality opinion in *Van Orden* demonstrates that application of the *Lemon* test may not be necessary. However, because the Seventh Circuit applied the *Lemon* test in *Mercier* and *Marshfield*, it is surprising that the Ninth Circuit did not apply that test to the *Buono* sale.<sup>259</sup> Instead, the court ended its review with the *Marshfield* "unusual circumstances" analysis.<sup>260</sup> While the Ninth Circuit applied the *Lemon* test to the presence of the cross itself in *Buono II*,<sup>261</sup> its analysis in *Buono IV* focused on whether the sale would cure the Establishment Clause violation and only used the *Marshfield* analysis to reach the conclusion that such a sale would not cure the violation.<sup>262</sup> The Ninth Circuit further stated that the procedural posture of the case (and the proposed transfer) did not change its previous determination that the cross memorial was a government endorsement of religion.<sup>263</sup> The *Lemon* test requires that every prong must be satisfied in order to survive judicial scrutiny: "State action violates the Establishment Clause if it fails to satisfy any of these prongs."<sup>264</sup> However, analysis of the sale itself under the *Lemon* test demonstrates that each of the prongs are satisfied when the history and context of the *Buono* cross is considered.

1. *Secular Purpose*.—Neither the Ninth Circuit nor the district court discussed the secular purpose prong when evaluating the cross itself in *Buono I*

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257. *Id.* at 691-92.

258. *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1076 (9th Cir. 2007), *amended and superseded on denial of reh'g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

259. *Mercier*, 395 F.3d at 704-05; *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 493-96 (7th Cir. 2000).

260. *Buono IV*, 502 F.3d at 1086.

261. *Buono v. Norton (Buono II)*, 371 F.3d 543, 548-50 (9th Cir. 2004).

262. *Buono IV*, 502 F.3d at 1081-86.

263. *Id.* at 1086 (citing *Buono II*, 371 F.3d at 548-50).

264. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

and *Buono II* because the cross failed under the effect prong.<sup>265</sup> However, based on discussion of the effect prong, it is unlikely that the Ninth Circuit would have found that the cross had a secular purpose, or at least not one that could overcome the religious nature of the cross itself.<sup>266</sup> Nevertheless, the Ninth Circuit would be incorrect in finding that the cross (or the transfer of it) did not have a secular purpose when the facts of *Buono* are compared to those in *Mercier*.

In *Mercier*, the court looked at the connection between the Ten Commandments monument and its role in honoring those who helped the city of La Crosse during a flood.<sup>267</sup> Before the monument was installed, young volunteers in the area worked hard to limit damage to the city during a spring flood by filling in excess of 51,000 sandbags.<sup>268</sup> After dedication of the monument, a local paper reported that the monument was dedicated to those young volunteers.<sup>269</sup> The Seventh Circuit distinguished the La Crosse monument from another Seventh Circuit Ten Commandments case in which a secular purpose was advanced only after litigation was imminent.<sup>270</sup> The *Buono* cross was originally installed as a war memorial in 1934, and similar to *Mercier*, its secular purpose was clear when it was erected.<sup>271</sup> In addition to evaluating the monument itself, the court in *Mercier* focused on the secular motive of the sale: to separate the City from the monument in response to litigation.<sup>272</sup> Similarly, the transfer proposed in section 8121 was directly in response to the *Buono* litigation, based on the timing of the statute.<sup>273</sup>

2. *Primary Effect Advances or Inhibits Religion.*—While the “endorsement test”<sup>274</sup> and “reasonable person” test<sup>275</sup> are not part of the original *Lemon* test, the

265. *Buono II*, 371 F.3d at 550; *Buono v. Norton (Buono I)*, 212 F. Supp. 2d 1202, 1215 (C.D. Cal. 2002), *aff'd*, 371 F.3d 543 (9th Cir. 2004).

266. Only Judge O’Scannlain found that the large cross at issue in *SCSC* had a secular purpose as a war memorial, though he did agree with the majority that it would violate the effect prong. *Separation of Church & State Comm. v. City of Eugene (SCSC)*, 93 F.3d 617, 626 (9th Cir. 1996) (*per curiam*) (O’Scannlain, J., concurring). For more information on *SCSC* see *supra* text accompanying notes 54-56.

267. *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 704-05 (7th Cir. 2005).

268. *Id.* at 696.

269. *Id.*

270. *Id.* 704-05 (citing *Books v. City of Elkhart*, 235 F.3d 292, 304 (7th Cir. 2002)).

271. *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1072 (9th Cir. 2007), *amended and superseded on denial of reh’g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

272. *Mercier*, 395 F.3d at 704-05.

273. Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87 § 8121, 117 Stat. 1054, 1100 (2003) (codified at 16 U.S.C. § 410aaa-56 (2006)). Congress passed this Act after *Buono I* was decided.

274. *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring).

275. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 778-80 (1995) (O’Connor, J., concurring).

Ninth Circuit discussed these tests along with the effect prong, and therefore they are included in the analysis of the effect prong.<sup>276</sup> In discussing the effect prong of the *Lemon* test and formulating the endorsement test, Justice O'Connor stated: "The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."<sup>277</sup> Part of evaluating the effect of a particular action includes assessing the reaction of a reasonable person: "[A] reasonable observer 'must be deemed aware of the history and context of the community and forum in which the religious display appears,' including ownership of the land in question."<sup>278</sup> While both of these definitions come from concurring opinions written by Justice O'Connor, they are also the definitions the district court and Ninth Circuit used in evaluating the effect prong in *Buono I* and *Buono II*.

The Ninth Circuit disregarded the notion that a sign explaining the origins of the cross as a war memorial would mitigate the Establishment Clause problem, even to a reasonable observer.<sup>279</sup> The court stated that a reasonable observer would also know the legislative history related to the cross and perceive it as government preference for religion.<sup>280</sup> However, the legislation started in 2000 when someone called Congressman Lewis and alerted him to removal of a "veteran's memorial."<sup>281</sup> When the cross became a national memorial in January 2002, this was a few short months after the September 11, 2001, terrorist attacks when patriotism was at a high level within the country.<sup>282</sup> Furthermore, other memorials, even one located in France, received funding in this appropriations bill.<sup>283</sup>

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276. *Buono v. Norton (Buono II)*, 371 F.3d 543, 550 (9th Cir. 2004).

277. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). This description of the effect prong was used by the district court in *Buono I*. *Buono v. Norton (Buono I)*, 212 F. Supp. 2d 1202, 1215 (C.D. Cal. 2002), *aff'd*, 371 F.3d 543 (9th Cir. 2004). See *supra* text accompanying notes 38-41.

278. *Buono II*, 371 F.3d at 550 (quoting *Capitol Square*, 515 U.S. at 780-81). See *supra* text accompanying notes 45-48 for additional background about *Capitol Square*.

279. *Id.* at 549 n.5 (citing *Separation of Church & State Comm. v. City of Eugene (SCSC)*, 93 F.3d 617, 626 (9th Cir. 1996) (per curiam) (O'Scannlain, J., concurring)).

280. *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1085-86 (9th Cir. 2007) (citing *Buono II*, 371 F.3d at 548-50), *amended and superseded on denial of reh'g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

281. *Buono I*, 212 F. Supp. 2d at 1206.

282. See, e.g., Michael Cooper, *A Nation Challenged: Patriotism; Two Months After the Attack, a Veterans Day Parade During Wartime*, N.Y. TIMES, Nov. 12, 2001, at B9. There is no evidence within the available legislative history that the 9/11 attacks specifically fueled the listing of this memorial, but part of the title of the appropriations bill was "Recovery From and Response to Terrorist Attacks." This shows what the primary motivation was for the Bill. Department of Defense and Emergency Supplemental Appropriations For Recovery From and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, § 8137, 115 Stat. 2230, 2278 (2002) (codified at 16 U.S.C. § 431 (2006)).

283. See, e.g., § 8136, 115 Stat. at 2278 (codified at 42 U.S.C. § 429 (2006)) (benefiting Lafayette Escadrille Memorial in Marnes la-Coguette, France); Department of Defense and

The Ninth Circuit rightly noted in *Buono II* that the “Latin cross ‘is the preeminent symbol of Christianity.’”<sup>284</sup> Judge O’Scannlain stated in his *SCSC* concurrence that the large cross in that case had a secular purpose as a war memorial, but still seemed to endorse religion because of its form.<sup>285</sup> The court in *Buono II* did not find *Buono* distinguishable from *SCSC*, even though the *Buono* cross was erected as a war memorial and the *SCSC* cross was designated as a memorial several years after its construction.<sup>286</sup> Even though Easter services have occurred at the cross, the decisions of private individuals to use this site for religious worship should not dictate an Establishment Clause violation.<sup>287</sup>

When analyzing the transfer in *Buono IV*, the court used the analysis from *Marshfield*, but failed to state how this cross was different than the Jesus statue at issue in that case.<sup>288</sup> While the Ninth Circuit is obviously not bound to follow Seventh Circuit decisions, this omission seems to indicate that the court was picking and choosing its analysis without considering the entire context of the preceding cases. The Seventh Circuit discussed the restrictions on the government limiting religious free speech, even though in *Marshfield* the issue was private religious speech in a public forum.<sup>289</sup> This concern was not mentioned in any of the *Buono* decisions. The Seventh Circuit recognized that the *Marshfield* Jesus statue “create[d] the perception of government endorsement in a reasonable observer,” but this perception could be cured with a narrow remedy using a fence and signage.<sup>290</sup> This begs the question of how the Ninth Circuit used the same analysis from *Marshfield*, but did not come to a similar conclusion that transferring (and properly marking) the property ended the Establishment Clause violation. This is particularly vexing considering the secular history of the cross compared to the history of the Jesus statue in *Marshfield*.<sup>291</sup>

The Seventh Circuit’s conclusion in *Mercier* is the opposite of the Ninth

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Emergency Supplemental Appropriations For Recovery From and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, § 8138, 115 Stat. 2230, 2279 (codified at 16 U.S.C. § 431 (2006)) (allocating \$4.2 million to benefit the U.S.S. Alabama Battleship Foundation, an organization that preserves the ship’s memorial and museum).

284. *Buono II*, 371 F.3d at 545 (quoting *Buono I*, 212 F. Supp. 2d at 1205).

285. Separation of Church & State Comm. v. City of Eugene (*SCSC*), 93 F.3d 617, 626 (9th Cir. 1996) (per curiam) (O’Scannlain, J., concurring). See *supra* text accompanying notes 54-56 for additional background.

286. *Buono II*, 371 F.3d at 548-50.

287. *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1072 (9th Cir. 2007), *amended and superseded on denial of reh’g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

288. *Id.* at 1081-85.

289. Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 493 (7th Cir. 2000) (citing Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993)).

290. *Id.* at 495, 497.

291. *Id.* at 489. The Jesus statue was a part of a rest area and even bears the inscription: “Christ Guide Us On Our Way.” *Id.*

Circuit's. In *Mercier*, the court determined that a reasonable observer aware of all of the history of the monument, the City's efforts to divest itself of the monument, and its location away from any seat of government would not believe that the sale of the monument itself advanced religion.<sup>292</sup> The court clearly stated: "[T]he sale of the property did not have the 'primary or principal effect of advancing a religion.'"<sup>293</sup>

3. *Excessive Entanglement with Religion*.—This prong was not addressed in *Buono I* (and consequently *Buono II*) because the effect prong failed the *Lemon* test. Therefore, it is not clear how the Ninth Circuit would have evaluated this prong. In *Mercier*, the court did not address this prong because neither of the parties asserted that it failed.<sup>294</sup>

In evaluating the *Buono* transfer, it is doubtful that it would fail this prong of the test, or that *Buono* would argue that there is an excessive entanglement with religion. The government is trying to separate itself from the war memorial and sell it to a secular non-profit organization. The NPS's minimal involvement with the monument continues only because of its status as a war memorial, not because the monument is a religious site.

#### D. *The Proper Remedy?*

One key difference between *Marshfield* and *Buono* is that the *Marshfield* court remanded the case to the district court to find a narrowly tailored remedy that would not require removal of the statue.<sup>295</sup> It stated that the options were to either estop a private group's expression of religious speech on its own land (ostensibly by removing the Jesus statue) or to differentiate between property owned by the memorial fund and the City.<sup>296</sup> The court further stated that "[t]he latter—not the former—is the appropriate solution."<sup>297</sup>

In comparison, the Ninth Circuit all but ridiculed Congress for "carving out a tiny parcel of property in the midst of this vast Preserve—like a donut hole with the cross atop it."<sup>298</sup> Furthermore, the Ninth Circuit did not offer NPS an

292. *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 705 (7th Cir. 2005). *But see id.* at 706 (Bauer, J., dissenting) (comparing monument's disclaimer that City is not endorsing religion to the wizard in *The Wizard of Oz* who "directs the onlookers to 'pay no attention to that man behind the curtain'").

293. *Id.* at 705 (majority opinion) (quoting *Books v. City of Elkhart*, 235 F.3d 292, 304 (7th Cir. 2002)).

294. *Id.* at 704.

295. *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 497 (7th Cir. 2000).

296. *Id.*

297. *Id.*; see also Jordan C. Budd, *Cross Purposes: Remediating the Endorsement of Symbolic Religious Speech*, 82 DENV. U. L. REV. 183, 230-31 (2004) (discussing instances when it is not appropriate to remove a prominent monument or symbol in order to avoid "private religious strife").

298. *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1086 (9th Cir. 2007), *amended and superseded on denial of reh'g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v.*

opportunity to rework the deal in a way that could stipulate clear demarcation of the cross memorial and less government involvement. Alternatively, the court could have allowed the land transfer to go forward and outlined what the NPS could do if ownership of the site (and the cross) reverted to the federal government. *Buono* involves both a larger public park and a different degree of government involvement (through the succession of congressional acts) than seen in *Marshfield*.<sup>299</sup> Nevertheless, it seems that reasonable judicial discretion would have involved stipulating what could be a constitutionally acceptable solution, or at least to give more guidance for future cases. Instead, the Ninth Circuit's stance appears to be that any religious symbol, regardless of its purpose, is a violation of the Establishment Clause.

### CONCLUSION

The *Buono* Memorial is probably still standing on Sunrise Rock, though it is likely still covered by a plywood box. The Ninth Circuit denied the government's petition for a rehearing *en banc* on May 14, 2008.<sup>300</sup> A majority of judges voted not to rehear the case, but Judge O'Scannlain wrote a lengthy dissenting opinion that was joined by four other judges in the Ninth Circuit.<sup>301</sup> Judge O'Scannlain highlighted several deficiencies within *Buono IV*, stating that the decision deviates from Supreme Court precedent, "creates a split with the Seventh Circuit on multiple issues, and invites courts to encroach upon private citizens' rights under both the speech and religion clauses of the First Amendment."<sup>302</sup> His opinion, along with the clear split between the Seventh and Ninth Circuits on how to evaluate the sale of land in response to an Establishment Clause violation, might help explain why the Supreme Court granted the government certiorari.<sup>303</sup> Until the Supreme Court substantively addresses these discrepancies, Establishment Clause jurisprudence will remain foggy. There is no clear guidance as to how an Establishment Clause violation can be cured when monuments are involved, short of the monument's removal.

The Ninth Circuit did not adequately perform an independent assessment of whether the NPS's transfer of the *Buono* Memorial to a local chapter of the VFW cured the Establishment Clause violation. While the Ninth Circuit was primarily concerned with whether the proposed transfer violated the 2002 injunction, it

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Buono, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

299. *Id.* at 1072-77.

300. *Buono v. Kempthorne (Buono V)*, 527 F.3d 758, 759-60 (9th Cir. 2008). The court denied the petition after rewording part of footnote 13 within the *Buono IV* opinion, which discussed *Marshfield*. *Id.*

301. *Id.*

302. *Id.* (O'Scannlain, J., dissenting). This Note was finalized prior to publication of Judge O'Scannlain's opinion, but his dissent in *Buono V* criticizes many of the same issues discussed within this Note. *See id.* at 760-68. However, Judge O'Scannlain did not discuss why the court in *Buono IV* did not apply the *Lemon* test.

303. *Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

seemed to rest its analysis largely on its previous determination that the symbol itself was a violation, without considering any alternatives to ending the violation.<sup>304</sup> By contrast, in *Mercier*, both the “unusual circumstances” analysis and *Lemon* test were applied to evaluating the monument or religious symbol transfer. The Ninth Circuit also did not apply reasoning used by the plurality in *Van Orden*, which gave the court an alternative method of evaluating Establishment Clause cases.

The *Buono IV* decision further highlights a troubling tension between Congress and the Ninth Circuit. The court jumped to the conclusion that Congress acted unconstitutionally in authorizing the sale by assuming the aim of Congress was to avoid the *Buono I* injunction.<sup>305</sup> However, courts typically like to avoid constitutional determinations if at all possible: “It is well settled that this Court will not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided.”<sup>306</sup>

As *Mercier* and *Marshfield* illustrate, a court can find a solution to an Establishment Clause violation that does not require removal of the monument or religious symbol. Establishment Clause jurisprudence is admittedly muddled, but by diverting sharply from the Seventh Circuit in *Marshfield* and *Mercier*, the Ninth Circuit has made matters worse with its ruling in *Buono IV*. A review of *Buono IV* provides a good opportunity for the Supreme Court to address whether sale of property is a proper remedy for an Establishment Clause violation. Selling government property is not always the answer.<sup>307</sup> The Seventh Circuit’s opinions certainly did not advocate selling off property to end a violation: “We are not endorsing a non-remedial initiative designed to sell off patches of government land to various religious denominations as a means of circumventing the Establishment Clause.”<sup>308</sup> However, property transfers provide an opportunity to maintain certain secular memorials and respect their place in history in spite of any allied religious overtones.<sup>309</sup>

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304. *Buono IV*, 502 F.3d at 1085-86; see also *Buono V*, 537 F.3d at 763 (O’Scannlain, J., dissenting) (“[T]he *Buono IV* opinion . . . has bestowed upon judges the extraordinary authority to enjoin private parties from displaying religious symbols on their own land based solely on the government’s pre-divestment conduct, absent any showing that the government would remain ‘intimately involved’ in the care and maintenance of privately-owned land.” (emphasis added)).

305. *Buono IV*, 502 F.3d at 1086.

306. *United States v. Clark*, 445 U.S. 23, 27 (1980).

307. See *Buono V*, 527 F.3d at 764 (O’Scannlain, J., dissenting).

308. *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 702 (7th Cir. 2005).

309. See *id.* at 705 (“A reasonable person, considering the history of the monument . . . would understand the City’s desire to keep the [Ten Commandments] Monument in its original location.”); see also *id.* at 702 (“The desire to keep the Monument in place cannot automatically be labeled a constitutional violation. Removal is . . . not a necessary solution.”).