



May 20, 2010

Attorney General Eric Holder
U.S. Department of Justice
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Washington, DC 20530-0001

Ken Salazar, Secretary of the Interior
Department of the Interior
1849 C Street, N.W.
Washington DC 20240

Jonathan B. Jarvis, Director
National Park Service
1849 C Street NW
Washington, DC 20240

Re: Mojave Desert Veterans Memorial

Dear Attorney General Holder, Secretary Salazar, and Director Jarvis:

As the American Center for Law & Justice (ACLJ) understands through recent news reports,¹ the National Park Service has refused permission to the Sandozes, the caretakers of California's Mojave Desert Veterans Memorial, to replace the cross that was recently stolen from the Memorial. As you know, this memorial has been the subject of litigation for the past several years because it has included a commemorative cross since 1934. Notably, last month in the case of *Salazar v. Buono*, No. 08-472, slip op. (U.S. April 28, 2010), the Supreme Court of the United

¹ Joseph Abrams, *New Mojave Desert Cross Sits in Limbo in California Desert*, FOXNEWS.COM, May 19, 2010, <http://www.foxnews.com/us/2010/05/19/new-mojave-desert-cross-sits-limbo-california-desert/#/us/2010/05/19/new-mojave-desert-cross-sits-limbo-california-desert/print>.

States reversed a lower court decision that had invalidated a federal law that preserved the federal veteran's memorial by transferring the land on which it stood to a private party. The ACLJ filed an *amici curiae* brief on behalf of itself and 15 members of Congress, arguing that the Plaintiff lacked standing to bring the case and that the federal law transferring the land to the VFW is constitutional. The ACLJ represented House Minority Leader John Boehner as well as Representatives Todd Akin, Michele Bachmann, Roy Blunt, Eric Cantor, Randy Forbes, Scott Garrett, Walter Jones, Jim Jordan, Doug Lamborn, Thaddeus McCotter, Jeff Miller, Mike Pence, Joseph Pitts, and Joe Wilson. This current action by the Park Service to prevent the replacement of the cross is not required by any judicial decision or the Constitution.

By way of introduction, the ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often defend various governmental entities against claims that the presence of a religious symbol on government property violates the Establishment Clause. *See e.g., Books v. Elkhart County*, 401 F.3d 857 (7th Cir. 2005); *ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004). ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion. *See, e.g., Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (Feb. 25, 2009) (unanimously holding that a monument erected and maintained by the government on its own property constitutes government speech and does not create a right for private individuals to demand that the government erect other monuments); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (unanimously striking down a public airport's ban on First Amendment activities).

Given the long legal history of this case and the Supreme Court's recent decision in *Salazar*, it is both premature and counterproductive for the park service to essentially return to the original injunction in this case, forbidding the presence of the cross. We understand that you may be concerned that allowing the cross to be replaced may require you to remove it later if the courts ultimately find the transfer of the land on which the cross stood unconstitutional. But this should not be a serious concern because as we demonstrate below, the Court's plurality opinion in *Salazar*, authored by Justice Kennedy, provides strong support for war memorials that include crosses and strongly suggests that the land transfer, and, indeed, the original placement of the cross on federal property, is constitutional. The opinion states that "a Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people." Plurality op. at 17. Because the cross itself in this case does not likely violate the Establishment Clause, neither would replacing the stolen cross. Therefore, the ACLJ strongly urges the National Park Service and the Department of Justice to permit the caretakers to replace the cross.

Factual Background

In 1934, members of the Veterans of Foreign Wars (VFW) built a cross to memorialize service members who died in World War I. The VFW built the cross in a remote area that subsequently became part of a federal preserve. The original cross eventually deteriorated, but a new cross was put up to replace it. After the National Park Service denied a request to build a Buddhist shrine near the cross in 1999 and declared its intent to remove the cross, Congress designated the cross and an area of adjoining property as a national World War I memorial.

A former Parks Service employee challenged the government's maintenance of the memorial on Establishment Clause grounds. He stated that he did not object to the cross itself; rather, he thought that the area should be turned into a public forum open for private groups to build a variety of monuments. The district court held that the Plaintiff had standing to bring the case and held that the federal government's display of the cross violated the Establishment Clause because a reasonable observer of the memorial would believe that the government had endorsed religion. The court enjoined the government from maintaining the cross on its property, and the Ninth Circuit affirmed this holding. That decision was not appealed to the Supreme Court, so it became final.

In the meantime, Congress directed the Department of the Interior to convey one acre of property that included the memorial to the VFW in exchange for a five-acre parcel of equal value. The land could revert back to the federal government if the site ever ceases to be used as a war memorial. It is common for government actors to sell property containing symbols with religious significance to private parties in order to cure an actual or potential Establishment Clause violation. *Id.* at 5 (Alito, J., concurring).

Plaintiff brought another action seeking to have the land transfer declared unconstitutional. The district court and the Ninth Circuit held that the proposed sale of the property to the VFW did not cure the alleged violation of the Establishment Clause because the transfer was merely an attempt by the government to keep the cross in place. The district court enjoined the government from implementing the land transfer statute. The Supreme Court granted certiorari on the issues of standing to bring the lawsuit and also the lower court's invalidation of the land transfer statute.

Supreme Court Decision

The Supreme Court held by a 5-4 vote that the lower court decisions were incorrect and sent the case back down to the trial court for further consideration. A three-judge plurality held that, although the Plaintiff had standing, the lower courts' analysis of the secular purpose and effect of Congress' actions was incorrect. Two other Justices believed that the Plaintiff lacked standing.

Plurality Opinion

On the merits of the case, the plurality reiterated that it had no opportunity to consider whether the district court erred in holding that maintaining the memorial on federal land violated the

Establishment Clause. Rather, the issue was whether the district court erred in enjoining enforcement of the land transfer statute. *Id.* at 10. After noting the extraordinary nature of injunctive relief, the plurality stated that “the District Court did not engage in the proper inquiry.” *Id.* The District Court erred in holding that the land transfer statute was enacted for the purpose of saving the cross, and also erred in holding that such a purpose would necessarily be improper. *Id.* at 11. While the plurality opinion did not expressly hold that the land transfer was constitutional, the plurality did strongly suggest that it was.

The plurality explained:

By dismissing Congress’s motives as illicit, the District Court took insufficient account of the context in which the statute was enacted and the reasons for its passage. Private citizens put the cross on Sunrise Rock to commemorate American servicemen who had died in World War I. Although certainly a Christian symbol, the cross was not emplaced on Sunrise Rock to promote a Christian message. . . . Placement of the cross on Government-owned land was not an attempt to set the *imprimatur* of the state on a particular creed. Rather, those who erected the cross intended simply to honor our Nation’s fallen soldiers.

Id.

The plurality also concluded that, because the cross had existed for decades, the veterans’ secular message “had become entwined in the public consciousness.” *Id.* at 11-12. Moreover, “Congress ultimately designated the cross as a national memorial, ranking it among those monuments honoring the noble sacrifices that constitute our national heritage. . . . It is reasonable to interpret the congressional designation as giving recognition to the historical meaning that the cross had attained.” *Id.* at 12. The transfer statute was a reasonable response to the dilemma that Congress faced: “It could not maintain the cross without violating the injunction, but it could not remove the cross without conveying disrespect for those the cross was seen as honoring.” *Id.* The plurality noted that the District Court’s presumption that Congress sought to “evade” the injunction was improper. *Id.* at 13. Noting that all branches of government have an obligation to uphold the Constitution, the plurality stated that Congress’s balancing of competing interests should not be easily dismissed by courts. *Id.*

Moreover, while the plurality did not decide whether maintaining the cross on government property would violate the Establishment Clause, the plurality strongly suggested it would not:

Although, for purposes of the opinion, the propriety of the 2002 injunction may be assumed, the following discussion should not be read to suggest this Court’s agreement with that judgment, some aspects of which may be questionable. *The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm.* A cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs. The Constitution does not oblige government to avoid any public acknowledgment of religion’s

role in society. . . . Rather, it leaves room to accommodate divergent values within a constitutionally permissible framework.

Id. at 14-15 (emphasis added).

The plurality upbraided the district court for:

fail[ing] to consider whether, in light of the change in law and circumstances effected by the land-transfer statute, the “reasonable observer” standard continued to be the appropriate framework through which to consider the Establishment Clause concerns invoked to justify the requested relief. As a general matter, courts considering Establishment Clause challenges do not inquire into “reasonable observer” perceptions with respect to objects on private land. Even if, however, this standard were the appropriate one . . . it is not clear that Buono’s claim is meritorious. That test requires the hypothetical construct of an objective observer who knows all of the pertinent facts and circumstances surrounding the symbol and its placement. . . . Applying this test here, the message conveyed by the cross would be assessed in the context of all relevant factors.

Id. at 16-17.

To the contrary,

the District Court concentrated solely on the religious aspects of the cross, divorced from its background and context. *But a Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people.* Here, one Latin cross in the desert evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten.

Id. at 17 (emphasis added).

The plurality remanded the case to the district court to reconsider whether the land transfer statute is constitutional in light of the plurality’s analysis. *Id.* at 18.

Concurring Opinions

Chief Justice Roberts and Justice Alito wrote concurring opinions that buttressed the plurality’s conclusion that the district court had applied the wrong standard in deciding whether the land transfer was constitutional and its strong suggestion that the statute was constitutional. Chief Justice Roberts noted that Plaintiff’s counsel had admitted that it would be permissible for the government to tear down the cross, sell the land to the VFW, and return the cross to them with the VFW immediately re-raising it. As such, “I do not see how it can make a difference for the

Government to skip that empty ritual and do what Congress told it to do—sell the land with the cross on it.”

Justice Alito wrote a concurring opinion that argued that the Court should have expressly held that the land transfer statute is constitutional. He noted that the memorial was built in a remote desert area by veterans who experienced World War I firsthand. *Id.* at 3 (Alito, J., concurring). He also explained:

The cross is of course the preeminent symbol of Christianity, and Easter services have long been held on Sunrise Rock . . . But, as noted, the original reason for the placement of the cross was to commemorate American war dead and, particularly for those with searing memories of The Great War, the symbol that was selected, a plain unadorned white cross, no doubt evoked the unforgettable image of the white crosses, row on row, that marked the final resting places of so many American soldiers who fell in that conflict.

Id. at 3.

Justice Alito also noted that Congress’s action was necessary to avoid showing hostility toward religion and disrespect for the servicemen the cross honors:

If Congress had done nothing, the Government would have been required [by the original injunction] to take down the cross, which had stood on Sunrise Rock for nearly 70 years, and this removal would have been viewed by many as a sign of disrespect for the brave soldiers whom the cross was meant to honor. The demolition of this venerable, if unsophisticated, monument would also have been interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country’s religious heritage.

Id. at 4.

Justice Alito also stated that he,

would not jump to the conclusion that Congress’ aim in enacting the land-transfer law was to embrace the religious message of the cross; rather, I see no reason to doubt that Congress’ consistent goal, in legislating with regard to the Sunrise Rock monument, has been to commemorate our Nation’s war dead and to avoid the disturbing symbolism that would have been created by the destruction of the monument.

Id. at 7.

Justice Scalia wrote a concurring opinion, joined by Justice Thomas, arguing that the Plaintiff lacked standing to bring the case. Notably, Justice Scalia concluded by stating:

adhering to Article III's limits upon our jurisdiction respects the authority of those whom the people have chosen to make and carry out the laws. In this case Congress has determined that transferring the memorial to private hands best serves the public interest and complies with the Constitution, and the Executive defends that decision and seeks to carry it out. Federal courts have no warrant to revisit that decision—and to risk replacing the people's judgment with their own—unless and until a proper case has been brought before them. This is not it.

Id. at 7. Justice Scalia argued that the original injunction simply required the cross to no longer be displayed on public property, so the Plaintiff's request to have the transfer statute invalidated raised new standing issues. *Id.* at 3 (Scalia, J., concurring). "Because Buono seeks new relief, he must show . . . that he has standing to pursue it." *Id.* Justice Scalia noted that any continuing injury to the Plaintiff would be speculative at best, as the Plaintiff's alleged injury was the cross's presence on *public* land, and the VFW's obligation to maintain a war memorial on the site does not include a requirement that a cross will always remain in place. *Id.* at 4-5.

Conclusion

There is no good reason for the National Park Service to forbid the Memorial's caretakers from replacing the stolen cross. As explained above, based on *Salazar* there is a strong probability that the cross will be found not to violate the Establishment Clause. Moreover, not replacing the cross will essentially reward those who stole the cross. Finally, as Justice Alito recognized, removing the cross "would have been viewed by many as a sign of disrespect for the brave soldiers whom the cross was meant to honor." Likewise, failing to replace the stolen cross dishonors the memory of the veterans it was created to honor. Therefore, we respectfully request that you permit the caretakers to replace the cross immediately. We appreciate your consideration of this matter.

Sincerely yours,

Jay Alan Sekulow