



On April 28, 2010, in the case of *Salazar v. Buono*, the Supreme Court of the United States reversed a lower court decision that had invalidated a federal law that preserved a federal veteran's memorial by ensuring that it would become privately owned. The memorial has been the subject of litigation for the past several years because it has included a commemorative cross since 1934.

The Court's plurality opinion, authored by Justice Kennedy, provides strong support for war memorials that include crosses, stating 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. The plurality's viewpoint stands in stark contrast with that of dissenting Justices Stevens, Ginsburg, and Sotomayor who declared that a solitary Latin cross is "a dramatically inadequate and inappropriate tribute" to veterans. *Id.* at 25 (Stevens, J., dissenting).

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 in a remote area that is now 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 stated 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 this holding was affirmed by the United States Court of Appeals for the Ninth Circuit. 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.

In response, however, the district court and the United States Court of Appeals for 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.

The American Center for Law and Justice 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.

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. Four other Justices dissented.

Plurality Opinion

Justice Kennedy wrote the plurality opinion which was joined by Chief Justice Roberts and Justice Alito. The plurality held that the government could no longer challenge the Plaintiff's standing to seek removal of the cross because the government had raised the issue of standing at the outset of the case and did not appeal the Court of Appeals' ruling to the Supreme Court at that time. Plurality op. at 7. The plurality then held that a party has standing to seek enforcement of a final judgment it has obtained on the merits, so the Plaintiff has standing to question the legality of the transfer statute. *Id.* at 8. Since the plurality did not address the question of whether the Plaintiff had standing to bring an Establishment Clause challenge in the first place, its decision cannot be interpreted as signaling any opinion on that question.

Regarding the merits of the case, the plurality reiterated that it had no opportunity to consider the question of whether the district court erred in holding that maintenance of 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.

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, due to the cross’s existence 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.*

In addition, the plurality stated:

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 also stated:

The District Court failed 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 for reconsideration of whether the land transfer statute is constitutional in light of the plurality opinion’s analysis. *Id.* at 18.

Concurring Opinions

Chief Justice Roberts wrote a concurring opinion noting 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 by veterans who experienced World War I firsthand in a remote desert area, one that, “at least until this litigation . . . was [likely] seen by more rattlesnakes than humans.” *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.

He added:

If Congress had done nothing, the Government would have been required 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 criticized Justice Stevens' dissenting opinion, saying,

I 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, that argued that the Plaintiff lacked standing to bring the case. 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.

Justice Scalia concluded by saying:

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.

Dissenting Opinions

Justice Stevens wrote a dissenting opinion that was joined by Justices Ginsburg and Sotomayor. Justice Stevens stated that "[a] Latin cross necessarily symbolizes one of the most

important tenets upon which believers in a benevolent Creator, as well as nonbelievers, are known to differ.” *Id.* at 1-2 (Stevens, J., dissenting). He added, “I certainly agree that the Nation should memorialize the service of those who fought and died in World War I, but it cannot lawfully do so by continued endorsement of a starkly sectarian message.” *Id.* at 2.

Justice Stevens stated that the Plaintiff has standing because he would be unable to freely use the area around the cross, an injury that is attributable to government action. *Id.* at 4-5, n.2. In addition, the land transfer statute violated the injunction by permitting continued display of the cross, as the act of exchanging the property for another parcel of land was action attributable to the government. *Id.* at 6-7.

Justice Stevens believed that the transfer statute would not end any government endorsement of religion because the government’s purpose was to preserve the cross. *Id.* at 9. A reasonable observer would conclude that the government endorsed a religious message by taking steps to ensure that the cross would remain intact, such as prohibiting the use of federal funds to remove the cross and transferring the land to a private owner. *Id.* at 11-13, 17. Justice Stevens stated,

the solitary cross conveys an inescapably sectarian message. . . . [T]he “[L]atin cross is the preeminent symbol of Christianity. It is exclusively a Christian symbol, and not a symbol of any other religion.” . . . Making a plain, unadorned Latin cross a war memorial does not make the cross secular. It makes the war memorial sectarian.

Id. at 13-14. He added:

The cross is not a universal symbol of sacrifice. It is the symbol of one particular sacrifice, and that sacrifice carries deeply significant meaning for those who adhere to the Christian faith. . . . I, too, would consider it tragic if the Nation’s fallen veterans were to be forgotten. . . . But there are countless different ways, consistent with the Constitution, that such an outcome may be averted.

Id. at 15, n.8.

Importantly, however, Justice Stevens stated,

not every use of a religious symbol in a war memorial would indicate government endorsement of a religious message. . . . But this cross is not merely one part of a more elaborate monument that, taken as a whole, may be understood to convey a primarily nonreligious message. Rather, the cross is the only symbol conveying any message at all.

Id. at 14, n.7. This reasoning would seem to apply to other war memorials—such as the Mount Soledad Veterans Memorial in San Diego, California—that include a commemorative cross among numerous other symbols and items.

Justice Stevens concluded by saying:

As far as I can tell . . . it is unprecedented in the Nation’s history to designate a bare, unadorned cross as the national war memorial for a particular group of veterans.

Neither the Korean War Memorial, the Vietnam War Memorial, nor the World War II Memorial commemorates our veterans' sacrifice in sectarian or predominantly religious ways. Each of these impressive structures pays equal respect to all members of the Armed Forces who perished in the service of our Country in those conflicts. In this case, by contrast, a sectarian symbol is the memorial. And because Congress has established no other national monument to the veterans of the Great War, this solitary cross in the middle of the desert is the national World War I memorial. The sequence of legislative decisions made to designate and preserve a solitary Latin cross at an isolated location in the desert as a memorial for those who fought and died in World War I not only failed to cure the Establishment Clause violation but also, in my view, resulted in a dramatically inadequate and inappropriate tribute.

Id. at 25-26.

Justice Breyer also wrote a dissenting opinion stating that the only issue before the Court was whether the law governing injunctions authorizes the District Court to hold that the transfer statute falls within the scope of its original injunction. *Id.* at 2 (Breyer, J., dissenting). Justice Breyer concluded that the District Court's determination was reasonable because the purpose of the original injunction was to ensure that the government was not endorsing a religious message. *Id.* at 6. Since no important federal question was at issue, the Court should not have agreed to take the case. *Id.*