

SALAZAR v. BUONO
130 S. Ct. 1803 (2010)

Justice Kennedy announced the judgment of the Court and delivered an opinion, in which The Chief Justice joins and Justice Alito joins in part.

In 1934, private citizens placed a Latin cross on a rock outcropping in a remote section of the Mojave Desert. Their purpose and intent was to honor American soldiers who fell in World War I. The original cross deteriorated over time, but a reconstructed one now stands at the same place. It is on federal land. The Court is asked to consider a challenge, not to the first placement of the cross or its continued presence on federal land, but to a statute that would transfer the cross and the land on which it stands to a private party. Department of Defense Appropriations Act, 2004. The District Court permanently enjoined the Government from implementing the statute. The Court of Appeals affirmed. We conclude that its judgment was in error.

I

The Mojave National Preserve (Preserve) spans approximately 1.6 million acres in southeastern California. The Preserve is nestled within the Mojave Desert. Just over 90 percent of the land in the Preserve is federally owned, with the rest owned either by the State of California or by private parties. The National Park Service administers the Preserve as part of the National Park System.

Sunrise Rock is a granite outcropping located within the Preserve. Sunrise Rock and the area in its immediate vicinity are federal land, but two private ranches are located less than two miles away. The record does not indicate whether fencing is used to mark the boundary of these ranches. In 1934, members of the Veterans of Foreign Wars (VFW) mounted a Latin cross on the rock as a memorial to soldiers who died in World War I. The cross has been replaced or repaired at various times over the years, most recently in 1998 by Henry Sandoz. Sandoz is a private citizen who owns land elsewhere in the Preserve, a portion of which he is prepared to transfer to the Government in return for its conveyance to the VFW of the land on which the cross stands, all pursuant to the statute now under review.

The cross, as built by Sandoz, consists of 4-inch diameter metal pipes painted white. The vertical bar is less than eight feet tall. It cannot be seen from the nearest highway, which lies more than 10 miles away. It is visible, however, from Cima Road, a narrow stretch of blacktop that comes within 100 feet of Sunrise Rock.

The cross has been a gathering place for Easter services since it was first put in place; and Sunrise Rock and its immediate area continue to be used as a campsite. At one time the cross was accompanied by wooden signs stating " '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.' " The signs have since disappeared, and the cross now stands unmarked.

Frank Buono, respondent here, is a retired Park Service employee who makes regular visits to the Preserve. Buono claims to be offended by the presence of a religious symbol on federal land. He filed suit in the United States District Court for the Central District of California. He alleged a violation of the Establishment Clause and sought an injunction requiring the Government to remove the cross.

The litigation proceeded in what can be described as four stages. In the first, the District Court ruled in Buono's favor on opposing motions for summary judgment (Buono I). As an initial matter, the court found that Buono had standing to maintain his Establishment Clause challenge. On the merits, the parties agreed that the dispute should be governed by the *Lemon* test. The court evaluated the primary effect of the cross by asking how it would be viewed by a "reasonable observer." Concluding that presence of the cross on federal land conveyed an impression of governmental endorsement of religion, the court granted Buono's request for injunctive relief. The court's order in Buono I (2002 injunction) permanently forbade the Government "from permitting the display of the Latin cross in the area of Sunrise Rock."

The United States Court of Appeals for the Ninth Circuit stayed the 2002 injunction to the extent that it required the cross to be removed or dismantled but did not forbid alternative methods of complying with the order. The Government covered the cross, first with a tarpaulin and later with a plywood box. On appeal, the judgment of the District Court was affirmed, both as to standing and on the merits of Buono's Establishment Clause challenge (Buono II). The Government did not seek review by this Court, so the judgment of the Court of Appeals in Buono II became final.

During the relevant proceedings, Congress enacted certain statutes related to the cross:

(1) Before Buono I was filed, Congress passed an appropriations bill that included a provision forbidding the use of governmental funds to remove the cross.

(2) While Buono I was pending before the District Court, Congress designated the cross and its adjoining land "as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war." The Secretary of the Interior was directed to expend up to \$10,000 to acquire a replica of the original cross and its memorial plaque and to install the plaque at a suitable nearby location.

(3) Three months after Buono I was decided, Congress again prohibited the spending of governmental funds to remove the cross.

(4) While the Government's appeal in Buono II was pending, Congress passed a statute (land-transfer statute) directing the Secretary of the Interior to transfer to the VFW the Government's interest in the land that had been designated a national memorial. Department of Defense Appropriations Act, 2004. In exchange, the Government was to receive land elsewhere in the preserve from Henry Sandoz and his wife. Any difference in value between the two parcels would be equalized through a cash payment. The land-transfer statute provided that the property

would revert to the Government if not maintained "as a memorial commemorating United States participation in World War I and honoring the American veterans of that war." The statute presents a central issue in this case.

After the Court of Appeals affirmed in *Buono II*, *Buono* returned to the District Court seeking to prevent the land transfer. He sought injunctive relief against the transfer, either through enforcement or modification of the 2002 injunction. In evaluating his request the trial court described the relevant question as whether the land transfer was a bona fide attempt to comply with the injunction (as the Government claimed), or a sham aimed at keeping the cross in place (as *Buono* claimed) (*Buono III*). In *Buono III*, the court did not consider whether the transfer itself was an "independent violation of the Establishment Clause." The court nevertheless concluded that the transfer was an attempt by the Government to keep the cross atop Sunrise Rock and so was invalid. The court granted *Buono's* motion to enforce the 2002 injunction; denied as moot his motion to amend it; and permanently enjoined the Government from implementing the land-transfer statute. The Court of Appeals again affirmed.

II

Before considering the District Court's order on the merits, the first inquiry must be with respect to *Buono's* standing to maintain this action. The Government argues that *Buono's* asserted injury is not personal to him and so does not confer Article III standing. Whatever the validity of the objection to *Buono's* standing, that argument is not available to the Government at this stage of the litigation. When *Buono* moved the District Court in *Buono I* for an injunction requiring the removal of the cross, the Government raised the same standing objections it proffers now. Rejecting the Government's position, the District Court entered a judgment in *Buono's* favor, which the Court of Appeals affirmed in *Buono II*. The Government did not seek review in this Court. The judgment became final and unreviewable. The Government cannot now contest *Buono's* standing to obtain the final judgment in *Buono I*.

Of course, even though the Court may not reconsider whether *Buono* had standing to seek the 2002 injunction, it is still necessary to evaluate his standing in *Buono III* to seek application of the injunction against the land-transfer statute. Having obtained a final judgment granting relief on his claims, *Buono* had standing to seek its vindication. The Government does not deny this proposition as a general matter. Instead, it argues that *Buono* was not seeking to vindicate--but rather to extend--the 2002 injunction. The first injunction forbade the Government from maintaining the cross on Sunrise Rock; yet in *Buono III* he sought to preclude the land transfer, a different governmental action. The Government contends that the 2002 injunction did not provide a basis for the District Court to invalidate the land transfer. This is not an argument about standing but about the merits of the District Court's order. Those points now must be addressed.

III

The question now before the Court is whether the District Court properly enjoined the

Government from implementing the land-transfer statute. The District Court did not consider whether the statute, in isolation, would have violated the Establishment Clause, and it did not forbid the land transfer as an independent constitutional violation. Rather, the court enjoined compliance with the statute on the premise that the relief was necessary to protect the rights Buono had secured through the 2002 injunction.

An injunction is an exercise of a court's equitable authority. Equitable relief is not granted as a matter of course. Here, the District Court did not engage in the appropriate inquiry. The land-transfer statute was a substantial change in circumstances bearing on the propriety of the requested relief. The court, however, did not acknowledge the statute's significance. It examined the events that led to the statute's enactment and found an intent to prevent removal of the cross. Deeming this intent illegitimate, the court concluded that nothing of moment had changed. This was error.

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 placed 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.

Time also has played its role. The cross had stood on Sunrise Rock for nearly seven decades before the statute was enacted. By then, the cross and the cause it commemorated had become entwined in the public consciousness. Members of the public gathered regularly at Sunrise Rock to pay their respects. Rather than let the cross deteriorate, community members repeatedly took it upon themselves to replace it. Congress ultimately designated the cross as a national memorial. Research discloses no other national memorial honoring American soldiers who were killed or wounded in World War I. It is reasonable to interpret the congressional designation as giving recognition to the historical meaning that the cross had attained.

The 2002 injunction thus presented the Government with a dilemma. 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. Deeming neither alternative to be satisfactory, Congress enacted the statute here at issue. Congress, of course, may not use its legislative powers to reopen final judgments. That principle, however, was not a bar to this statute. The Government's right to transfer the land was not adjudicated in *Buono I* or compromised by the 2002 injunction.

In belittling the Government's efforts as an attempt to "evade" the injunction, the District Court had things backwards. Congress's prerogative to balance opposing interests and its institutional competence to do so provide one of the principal reasons for deference to its policy determinations. Here, Congress adopted a policy with respect to land it now owns in order to

resolve a specific controversy. The land-transfer statute embodies Congress's legislative judgment that this dispute is best resolved through a framework and policy of accommodation for a symbol that, while challenged under the Establishment Clause, has complex meaning beyond the expression of religious views. That judgment should not have been dismissed as an evasion.

Where legislative action has undermined the basis upon which relief has previously been granted, a court must consider whether the original finding of wrongdoing continues to justify the court's intervention. The relevant question is whether an ongoing exercise of the court's equitable authority is supported by the prior showing of illegality, judged against the claim that changed circumstances have rendered prospective relief inappropriate.

The District Court granted the 2002 injunction based solely on its conclusion that presence of the cross on federal land conveyed an impression of governmental endorsement of religion. The court expressly disavowed any inquiry into whether the Government's actions had a secular purpose or caused excessive entanglement. The Court of Appeals affirmed on the same grounds.

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.

Even assuming the propriety of the original relief, however, the question before the District Court in *Buono III* was whether to invalidate the land transfer. Given the sole reliance on perception as a basis for the 2002 injunction, one would expect that any relief grounded on that decree would have rested on the same basis. But the District Court enjoined the land transfer on an entirely different basis: its suspicion of an illicit governmental purpose. The court made no inquiry into the effect that knowledge of the transfer of the land to private ownership would have had on any perceived governmental endorsement of religion, the harm to which the 2002 injunction was addressed. The District Court thus used an injunction granted for one reason as the basis for enjoining conduct that was alleged to be objectionable for a different reason. Ordering relief under such circumstances was improper--absent a finding that the relief was necessary to address an independent wrong.

The District Court should have evaluated *Buono's* modification request in light of the objectives of the 2002 injunction. The injunction was issued to address the impression conveyed by the cross on federal, not private, land. Even if its purpose were characterized more generally as avoiding the perception of governmental endorsement, that purpose would favor--or at least not oppose--ownership of the cross by a private party rather than by the Government.

Buono argues that the cross would continue to stand on Sunrise Rock, which has no visual differentiation from the rest of the primarily federally owned Preserve. He also points to the reversionary clause in the land-transfer statute requiring that the land be returned to the Government if not maintained as a World War I memorial. Finally, he notes that the cross remains designated a national memorial by an Act of Congress, which arguably would prevent the VFW from dismantling the cross even if it wanted to do so.

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.

The District Court did not attempt to reassess the findings in Buono I in light of the policy of accommodation that Congress had embraced. Rather, 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.

Respect for a coordinate branch of Government forbids striking down an Act of Congress except upon a clear showing of unconstitutionality. Even if, contrary to the congressional judgment, the land transfer were thought an insufficient accommodation in light of the earlier finding of religious endorsement, it was incumbent upon the District Court to consider less drastic relief than complete invalidation of the land-transfer statute. For instance, if there is to be a conveyance, the question might arise regarding the necessity of further action, such as signs to indicate the VFW's ownership of the land.

Noting the possibility of specific remedies, however, is not an indication of agreement about the continued necessity for injunctive relief. The land-transfer statute's bearing on this dispute must first be determined. To date, this Court's jurisprudence in this area has refrained from making sweeping pronouncements, and this case is ill suited for announcing categorical rules. In light of the finding of unconstitutionality in Buono I, and the highly fact-specific nature of the inquiry, it is best left to the District Court to undertake the analysis in the first instance. On remand, if Buono continues to challenge implementation of the statute, the District Court should conduct a proper inquiry as described above.

Chief Justice Roberts, concurring.

At oral argument, respondent's counsel stated that it "likely would be consistent with the injunction" for the Government to tear down the cross, sell the land to the Veterans of Foreign Wars, and return the cross to them, with the VFW immediately raising the cross again. I do not see how it can make a difference for the Government to skip that empty ritual and sell the land with the cross on it. "The Constitution deals with substance, not shadows."

Justice Alito, concurring in part and concurring in the judgment.

I join Justice Kennedy's opinion in all respects but one: I would not remand this case for the lower courts to decide whether implementation of the land-transfer statute enacted by Congress in 2003 would violate the District Court's injunction or the Establishment Clause. The factual record has been sufficiently developed to permit resolution of these questions, and I would therefore decide them and hold that the statute may be implemented.

The singular circumstances surrounding the monument on Sunrise Rock presented Congress with a delicate problem, and the solution that Congress devised is true to the spirit of practical accommodation that has made the United States a Nation of unparalleled pluralism and religious tolerance.

After service in the First World War, a group of veterans moved to the Mojave Desert, in some cases for health reasons. They joined the Veterans of Foreign Wars (VFW), Death Valley Post 2884, and in 1934, they raised a simple white cross on an outcropping called Sunrise Rock to honor fallen American soldiers. Although Sunrise Rock was federally owned, this use of federal land seems to have gone largely unnoticed for many years, in all likelihood due to the spot's remote and rugged location.

Sunrise Rock is situated far from any major population center; temperatures often exceed 100 degrees Fahrenheit in the summer; and visitors are warned of the dangers of traveling in the area. As a result, at least until this litigation, it is likely that the cross was seen by more rattlesnakes than humans. Those humans who made the trip to see the monument appear to have viewed it as conveying at least two significantly different messages. The cross is of course the preeminent symbol of Christianity, and Easter services have long been held on Sunrise Rock. But 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.

This is roughly how things stood until the plaintiff brought this suit and obtained an injunction restraining the Federal Government from "permitting the display of the Latin cross in the area of Sunrise Rock." After the Ninth Circuit affirmed that decision, and the Government elected not to seek review by this Court, Congress faced a problem.

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 hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country's religious heritage.

Congress chose an approach that was designed to eliminate any perception of religious sponsorship stemming from the location of the cross on federally owned land, while at the same time avoiding the disturbing symbolism associated with the destruction of the historic monument. The mechanism that Congress selected is one that is quite common in the West, a "land exchange." Congress required that the Sunrise Rock parcel be used for a war memorial, but Congress did not prevent the VFW from supplementing the existing monument or replacing it with a war memorial of a different design. In my view, there is no legal ground for blocking the implementation of this law.

The dissent contends that the land transfer would violate the District Court injunction, but that argument is plainly unsound. The obvious meaning of the injunction was simply that the Government could not allow the cross to remain on federal land. There is also no merit in Justice Stevens' contention that implementation of the statute would constitute an endorsement of Christianity and would thus violate the Establishment Clause. Assuming that it is appropriate to apply the so-called "endorsement test," this test would not be violated by the land exchange. The endorsement test views a challenged display through the eyes of a hypothetical reasonable observer who is deemed to be aware of the history and all other pertinent facts relating to a challenged display. Here, therefore, this observer would be familiar with the origin and history of the monument and would also know both that the land on which the monument is located is privately owned and that the new owner is under no obligation to preserve the monument's present design. With this knowledge, a reasonable observer would not view the land exchange as the equivalent of the construction of an official World War I memorial on the National Mall.

Finally, I reject Justice Stevens' suggestion that the enactment of the land-transfer law was motivated by an illicit purpose. I would not be "so dismissive of Congress." I see no reason to doubt that Congress' consistent goal 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.

Justice Scalia, with whom Justice Thomas joins, concurring in the judgment.

I agree with the plurality that the Court of Appeals erred in affirming the District Court's order enjoining the transfer of the memorial. My reason, however, is quite different: In my view we cannot decide the merits of the dispute, because Frank Buono lacks Article III standing.

The plurality is correct that Buono's standing to obtain the original injunction is not before us.

Nor is Buono's standing to request enforcement of the original injunction at issue. As the plurality all but admits, the relief Buono requests and the District Court awarded is not enforcement of the original injunction but expansion of it. Because Buono seeks new relief, he must show that he has standing to pursue it. Buono must therefore demonstrate that the additional relief he sought--blocking the transfer of the memorial to a private party--will "redress or prevent actual or imminently threatened injury to [him] caused by private or official violation of law." He has failed, however, to allege any actual or imminent injury. To the contrary, his amended complaint averred that "he is deeply offended by the display of a Latin Cross on government-owned property" but "has no objection to Christian symbols on private property." Even assuming that being "deeply offended" by a religious display (and taking steps to avoid seeing it) constitutes a cognizable injury, Buono has made clear that he will not be offended.

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 unless and until a proper case has been brought before them. This is not it.

Justice Stevens, with whom Justice Ginsburg and Justice Sotomayor join, dissenting.

The question we confront is whether the District Court properly enforced its 2002 judgment by enjoining the [land] transfer. In answering that question we, like the District Court, must first consider whether the transfer would violate the 2002 injunction. We must then consider whether changed circumstances nonetheless rendered enforcement of that judgment inappropriate; or conversely whether they made it necessary for the District Court to bar the transfer, even if the transfer is not expressly prohibited by the prior injunction, in order to achieve the intended objective of the injunction.

I further accept that the District Court's task was to evaluate the changed circumstances "in light of the objectives of the 2002 injunction." Although I agree with the plurality's basic framework, I disagree with its decision to remand the case to the District Court. The District Court already "engage[d] in the appropriate inquiry," and it was well within its rights to enforce the 2002 judgment. First, the District Court properly recognized that the transfer was a means of "permitting"--indeed, encouraging--the display of the cross. The transfer therefore would violate the terms of the court's original injunction. Second, even if the transfer would not violate the terms of the 2002 injunction, the District Court properly took into account events that transpired since 2002 and determined that barring the transfer was necessary to achieve the intended result of the 2002 decree, as the transfer would not eliminate government endorsement of religion.

The objective of the 2002 judgment, as the plurality grudgingly allows, was to "avoi[d] the perception of governmental endorsement" of religion. The parties do not disagree on this point; rather, they dispute whether the transfer would end government endorsement of the cross. The District Court rightly found that the transfer would not end government endorsement of the cross.

A government practice violates the Establishment Clause if it "either has the purpose or effect of 'endorsing' religion." "Whether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same. The 2002 injunction was based on a finding that display of the cross had the effect of endorsing religion. The determination that the Government had endorsed religion necessarily rested on two premises: first, that the Government endorsed the cross, and second, that the cross "take[s] a position on questions of religious belief" or " 'mak[es] adherence to religion relevant ... to a person's standing in the political community,' " Taking the District Court's 2002 finding of an Establishment Clause violation as *res judicata*, as we must, the land transfer has the potential to dislodge only the first of those premises, in that the transfer might change the Government's endorsing relationship with the cross. As I explain below, I disagree that the transfer ordered by §8121 would in fact have this result. But it is also worth noting at the outset that the transfer statute could not (and does not) dislodge the second premise--that the cross conveys a religious message. Continuing government endorsement of the cross is thus continuing government endorsement of religion.

In my view, the transfer ordered by §8121 would not end government endorsement of the cross for two independently sufficient reasons. First, after the transfer it would continue to appear to any reasonable observer that the Government has endorsed the cross, notwithstanding that the name has changed on the title to a small patch of underlying land. This is particularly true because the Government has designated the cross as a national memorial, and that endorsement continues regardless of whether the cross sits on public or private land. Second, the transfer continues the existing government endorsement of the cross because the purpose of the transfer is to preserve its display. Congress' intent to preserve the display of the cross maintains the Government's endorsement of the cross.

Even though Congress recognized this cross for its military associations, the solitary cross conveys an inescapably sectarian message. As the District Court observed, it is undisputed that the "[L]atin cross is the preeminent symbol of Christianity. It is exclusively a Christian symbol, and not a symbol of any other religion." We have recognized the significance of the Latin cross as a sectarian symbol, and no participant in this litigation denies that the cross bears that social meaning. Making a plain, unadorned Latin cross a war memorial does not make the cross secular. It makes the war memorial sectarian.

More fundamentally, however, the message conveyed by the cross is not open to reconsideration given the posture of this case. However complex the meaning of the cross, the Court of Appeals in 2004 considered and rejected the argument that its dual symbolism as a war memorial meant that government endorsement of the cross did not amount to endorsement of religion. All we are debating at this juncture is whether the shift from public to private ownership of the land sufficiently distanced the Government from the cross; we are no longer debating the message the cross conveys to a reasonable observer. In arguing that Congress can legitimately favor the cross because of its purported double meaning, the plurality implicitly tries to reopen what is closed.

The plurality also poses a different objection to consideration of whether the transfer would

change a reasonable observer's perception of the cross. The plurality suggests that the " 'reasonable observer' standard" may not "be the appropriate framework" because "courts considering Establishment Clause challenges do not," as a general matter, "inquire into 'reasonable observer' perceptions with respect to objects on private land." Once again, the plurality's approach fails to pay heed to the posture of this case. At the risk of stating the obvious, respondent is not simply challenging a private object on private land. First, he is currently challenging official legislation, taken in response to an identified Establishment Clause violation. That legislation would transfer public land to a particular private party, with the proviso that the transferee must use the land to fulfill a specific public function or else the land reverts back to the Government. Second, even once the transfer is complete, the cross would remain a national memorial. The cross is therefore not a purely "private" object in any meaningful sense.

It is particularly appropriate in this context--when the issue is whether the transfer cures an already identified Establishment Clause violation--for the District Court to consider whether the Government, by complying with §8121, would have taken sufficient steps to avoid being perceived as endorsing the cross. The answer to that inquiry is surely no. The reasonable observer "who knows all of the pertinent facts and circumstances surrounding the symbol and its placement" would perceive that the Government has endorsed the cross: It prohibited the use of federal funds to take down the cross, designated the cross as a national memorial, and engaged in "herculean efforts to preserve the Latin cross" following the District Court's initial injunction. Those efforts include a transfer statute designed to keep the cross in place. Changing the ownership status of the underlying land in the manner required by §8121 would not change the fact that the cross conveys a message of government endorsement of religion.

Even setting aside that the effect of the post-transfer cross would still be to convey a message of government endorsement of religion, the District Court was correct to conclude that §8121 would not cure the Establishment Clause violation because the very purpose of the transfer was to preserve the cross. That evident purpose maintains government endorsement of the cross.

Our precedent provides that we evaluate purpose based upon what the objective indicia of intent would reveal to a reasonable observer. "[R]easonable observers have reasonable memories, and our precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose.' " A reasonable observer, considering the nature of this symbol, the timing and the substance of Congress' efforts, and the history of the Sunrise Rock site, could conclude that Congress chose to preserve the cross primarily because of its salience as a cross. But no such conclusion is necessary to find for respondent. The religious meaning of the cross was settled by the 2002 judgment; the only question before us is whether the Government has sufficiently distanced itself from the cross to end government endorsement of it. At the least, I stress again, a reasonable observer would conclude that the Government's purpose in transferring the underlying land did not sufficiently distance the Government from the cross. The District Court was therefore correct to find that the transfer would not end government endorsement of religion.

In sum, I conclude that the transfer ordered by §8121 will not end the pre-existing government

endorsement of the cross. Because the transfer would perpetuate the Establishment Clause violation at issue in the 2002 injunction, I further conclude that enjoining the transfer was necessary to secure relief. Enjoining compliance with §8121 was therefore a proper exercise of the District Court's authority to enforce the 2002 judgment.

I believe that most judges would find it to be a clear Establishment Clause violation if Congress had directed that a solitary Latin cross be erected on the Mall in the Nation's Capital to serve as a World War I Memorial. Congress did not erect this cross, but it commanded that the cross remain in place, and it gave the cross the imprimatur of Government. Transferring the land pursuant to §8121 would perpetuate rather than cure that unambiguous endorsement of a sectarian message.

Justice Breyer, dissenting.

The only question before us is whether the law permits the District Court to hold that the land transfer falls within the scope of its original injunctive order, an order that says the Government must not "permi[t] the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve." In my view the law authorizes the District Court to do so.

The legal principles that answer the question presented are found not in the Constitution but in cases that concern the law of injunctions. First, the law of injunctions grants a district court considerable leeway to interpret the meaning and application of its own injunctive order. Second, a court should construe the scope of an injunction in light of its purpose and history. These two principles adequately support the District Court's interpretation and application of the injunctive language at issue. As an initial matter, the plain text of the injunction is reasonably read to prohibit the transfer. Right now, the cross is covered with a plywood box; after the transfer, the box will be removed and the cross will be displayed. The transfer thus "permits" the public "display" of the cross. Indeed, that is the statute's objective.

Consideration of the injunction's purpose points in the same direction. The injunction rested upon the District Court's determination that the display of the cross "conveys a message of endorsement of religion" to "a reasonable observer" in violation of the Establishment Clause. The purpose of the injunction is to prevent the conveyance of such a message to the reasonable observer. The District Court considered the facts before it through the lens of the injunction's original purpose. And it concluded that the land transfer would frustrate that purpose. In my view, this is a reasonable conclusion.

The injunction forbids the Government to permit the display of the cross on Sunrise Rock, and its basic purpose was to prevent a reasonable observer from believing that the Government had endorsed the cross. Under the circumstances presented to the District Court, the transfer would have resulted in such a display and might well have conveyed such a message. Consequently, the District Court's decision that the land transfer violated the injunction as written and intended was not an abuse of discretion. That is what the Ninth Circuit held on appeal. I believe that we should simply affirm the Ninth Circuit's judgment.