

No. 08-472

In The
Supreme Court of the United States

—◆—
KEN SALAZAR, Secretary
of the Interior, *et al.*,

Petitioners,

v.

FRANK BUONO,

Respondent.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

—◆—
**BRIEF OF *AMICI CURIAE* VETERANS OF
FOREIGN WARS OF THE UNITED STATES, THE
AMERICAN LEGION, MILITARY ORDER OF THE
PURPLE HEART, VFW DEPARTMENT OF
CALIFORNIA, AMERICAN EX-PRISONERS OF
WAR, VFW POST 385, AND LIEUTENANT COLONEL
ALLEN R. MILIEFSKY UNITED STATES AIR
FORCE (RETIRED), SUPPORTING PETITIONERS**

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QUESTIONS PRESENTED

1. Whether respondent has alleged a concrete injury sufficient to confer standing for him to challenge the transfer of the Mojave Desert Veterans Memorial to private hands, given his explicit judicial admission that he has no objections whatsoever to the display of a cross on private land.

2. Whether the Mojave Desert Veterans Memorial violates the Establishment Clause.

3. Whether the act of Congress providing for the transfer of the Mojave Desert Veterans Memorial to private hands cured any conceivable constitutional violation.

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Department of Defense Appropriations Act,
2004, Pub. L. No. 108-87, § 8121, 117 Stat.
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American Battle Monuments Commission, [http://
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American Battle Monuments Commission, Meuse-
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American Battle Monuments Commission,
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American Battle Monuments Commission, St.
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(last visited June 3, 2009).....11

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United States Department of Veterans Affairs, Burial & Memorials, Prescott National Cemetery, http://www.cem.va.gov/cems/nchp/prescott.asp (last visited June 3, 2009)	13
VFW Department of California, Mojave Desert Veterans Memorial, http://www.vfwca.org/images/memorial_write_up_final.pdf (last visited June 5, 2009)	15

INTEREST OF *AMICI CURIAE*¹

Veterans of Foreign Wars of the United States (“VFW”) – The VFW is a congressionally chartered veterans service organization that represents over 2.3 million members. Established in 1899, the VFW was instrumental in creating the Veterans Administration, passing the World War II GI Bill and the GI Bill for the 21st Century, and developing the national cemetery system. The VFW helped fund the creation of the Vietnam Veterans Memorial, the Korean War Memorial, the World War II Memorial, the Women in Military Service Memorial, and numerous other memorials in and around the Nation’s capital. This case is of great concern to the VFW because it will have final management and ownership responsibility of the Mojave Desert Veterans Memorial (“the Veterans Memorial” or “the Memorial”) if the injunction prohibiting transfer of the Memorial is vacated. In addition, the Ninth Circuit’s ruling in this case that the Veterans Memorial must be torn down threatens hundreds of other veterans memorials that the VFW helped create as well as the creation of similar veterans memorials in the future.

The American Legion – Chartered by Congress in 1919, The American Legion is a community service

¹ All counsel of record consented to the filing of this *amici* brief. *Amici* state that no portion of this brief was authored by counsel for a party and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

organization representing approximately 2.6 million members, men and women – plus an Auxiliary of nearly 1 million members – in approximately 14,300 American Legion Posts throughout the United States, its territories, and 20 foreign countries, including England, Australia, Germany, Mexico, and the Philippines. Since its inception, The American Legion has maintained an ongoing concern and commitment to veterans and their families. The Legion helps military veterans survive economic hardship and secure government benefits. It drafted and obtained passage of the first GI Bill and its members were among the primary contributors to the Vietnam Veterans Memorial. It works to promote social stability and well-being for those who have honorably served our Nation's common defense. And it strives to ensure that those veterans who have sacrificed their lives for our country are properly remembered in local, state, and national veterans memorials. The proper resolution of this case is a matter of great concern to The American Legion because the ruling of the Ninth Circuit has a detrimental impact on its ability to honor those who have and do serve in our Nation's armed forces.

Military Order of the Purple Heart, Inc. –

The Military Order of the Purple Heart is a non-profit veterans service organization formed for the protection and mutual interest of all who have been awarded the Purple Heart. The Purple Heart is a combat decoration awarded only to those members of the armed forces of the United States wounded by a

weapon of war in the hands of the enemy. It is also awarded posthumously to the next of kin in the name of those who are killed in action or die of wounds received in action. Composed exclusively of Purple Heart recipients, the Order is the only veterans service organization composed strictly of combat veterans. The Order conducts welfare, rehabilitation, and service work for hospitalized and needy veterans and their families. It has also erected memorials to Purple Heart recipients in every state in the Nation. The Order is greatly concerned with the outcome of this case as it directly affects the future viability of veterans memorials that honor those who, like the Order's members, have shed their blood in this Nation's service.

Veterans of Foreign Wars, Department of California – The VFW Department of California is the California arm of the VFW responsible for administering VFW programs and initiatives within that state. Accordingly, it works with the VFW membership of California to advance the mission and programs of the VFW within that state and throughout the Nation. This case is of great concern to the VFW Department of California because, in accordance with VFW by-laws and procedure, the VFW Department of California assumed ownership of and responsibility for the Veterans Memorial when the charter of VFW Post 385 was revoked.

American Ex-Prisoners of War (“AXPOW”) – AXPOW is a national service organization composed of former prisoners of war from any war involving the

United States, including all former civil internees, and their families. It provides aid to American citizens who were captured by an enemy in time of war. It exists to help former prisoners of war deal with the trauma of their capture and confinement. AXPOW is greatly concerned with the proper resolution of this case as any ruling adverse to the Nation's veterans memorials would dishonor its members, who have been imprisoned in service to this Nation, and only add to their trauma.

VFW Post 385 – VFW Post 385 is located near the Veterans Memorial. Post 385 briefly became defunct in 2007 for failing to satisfy VFW administrative requirements in filing its convention registration. The VFW reactivated Post 385 on May 18, 2009 after it came into compliance with VFW requirements. Post 385, in conjunction with VFW Department of California, intends to maintain and preserve the Veterans Memorial as a memorial to United States veterans.

Lieutenant Colonel Allen R. Miliefsky, USAF Ret. – LTC Miliefsky currently serves as the Commander of the Jewish War Veterans Post 185, San Diego, California. He flew 258 combat missions in Vietnam and in 1968 served as the Battlefield Commander of his AC-47 gunship squadron during the Tet Offensive. Shot down near Danang Air Base, RVN, LTC Miliefsky was awarded the Distinguished Flying Cross for gallantry in battle. He retired from the U.S. Air Force in 1978. LTC Miliefsky has personally undertaken the task of raising the funds needed to place the first monument in Fort Rosecrans National

Cemetery in honor of Jewish war veterans who have made the ultimate sacrifice in service to the Nation. He assists the local Marine Corps Recruit Depot by attending Friday evening Sabbath services with recruits. He has also spoken before veterans groups and to the media to voice his support for the preservation of the Mt. Soledad Veterans Memorial in San Diego, California. The proper resolution of this case is of great concern to LTC Miliefsky given his ongoing efforts to honor the Nation's veterans with lasting memorials.



INTRODUCTION AND SUMMARY OF ARGUMENT

America has long memorialized and honored her fallen patriots. Many of those memorials contain crosses or other religious symbols and messages. The Argonne Cross in Arlington National Cemetery, for example, rests among pine trees representing the Argonne Forest where American servicemen gave their lives during World War I.² The Canadian Cross of Sacrifice, also at Arlington, dominates its surroundings with a

² See Arlington National Cemetery, Visitor Information, Monument and Memorials, Argonne Cross, http://www.arlingtoncemetery.org/visitor_information/Argonne_Cross.html (last visited June 3, 2009) (noting that the base of the cross contains the inscription ‘IN MEMORY OF OUR MEN IN FRANCE 1917 1918’). Photographs of veterans memorials referenced in this brief are set forth in Appendix A, App., *infra*, 1a-10a; see *id.* at 4a.

bronze sword affixed to a 24-foot gray granite cross. It sits directly across the road from the Arlington Memorial Amphitheater, visited by thousands each day who go to honor the Tomb of the Unknowns, which bears the inscription, “Here Rests In Honored Glory An American Soldier Known But To God.”³ The Cross of Sacrifice honors those Americans who joined the Canadian Armed Forces to fight in World War I before the United States entered the war. Dedicated in 1927 on Armistice Day, the monument was later modified to honor those who served in World War II and the Korean War.⁴

The Argonne Cross and the Canadian Cross of Sacrifice in Arlington are only two among thousands of veterans memorials with religious imagery erected in military cemeteries, in public parks, and in town squares across our Nation. The monument under constitutional attack in this case is no different. The Mojave Desert Veterans Memorial was erected 75 years ago to honor the “Dead of All Wars” by a group of World War I veterans who had retreated to the

³ See Arlington National Cemetery, Visitor Information, Tomb of the Unknowns at Arlington National Cemetery, http://www.arlingtoncemetery.org/visitor_information/tomb_of_the_unknowns.html (last visited June 3, 2009); Arlington National Cemetery, <http://www.arlingtoncemetery.net/unk-wwi.htm> (last visited June 7, 2009).

⁴ See Arlington National Cemetery, Visitor Information, Monument and Memorials, Canadian Cross, http://www.arlingtoncemetery.org/visitor_information/Canadian_Cross.html (last visited June 3, 2009), citing Peters, *Arlington National Cemetery: Shrine to America's Heroes* (2000); App., *infra*, 3a.

isolation of the 1.6-million acre Mojave Desert Preserve in search of solace and healing. For the first 50 years of its existence, the seven-foot-tall cross and plaque that comprise the Veterans Memorial were cared for by a veteran, John Riley Bembry, see App., *infra*, 11a, who served his country as a medic during World War I. Before his death in 1984, Mr. Bembry asked his friend, Henry Sandoz, to look after the Memorial. Although not a veteran himself, Mr. Sandoz was moved by his friend's request and, wishing to offer service to his country, took over the care of the Veterans Memorial.

In 2001, respondent, a former National Park Service ("NPS") employee who lives in Oregon, joined the American Civil Liberties Union ("ACLU") in filing suit to seek removal of the Veterans Memorial, claiming it violated the Establishment Clause. After the district court ordered the Memorial's removal in 2002, Congress enacted legislation with overwhelming bipartisan support to designate the Veterans Memorial as a "national memorial commemorating United States participation in World War I and honoring American veterans of that war." Department of Defense Appropriations Act, 2002, Pub. L. No. 107-117, Div. A, § 8137(a), 115 Stat. 2278. In addition, Congress instructed the NPS to transfer the single acre upon which the Memorial sits to Post 385 in Barstow, California in exchange for five acres elsewhere in the Mojave Desert Preserve to be donated by Mr. and Mrs. Sandoz. The Ninth Circuit held that the transfer did not cure the purported

Establishment Clause violation and ordered the Veterans Memorial removed.

The Ninth Circuit's ruling that the Memorial must be torn down for the sole reason that it takes the form of a cross evinces precisely the unjustified hostility toward religious symbols in a secular context that this Court condemned in *Van Orden v. Perry*, 545 U.S. 677 (2005). If the Ninth Circuit's ruling stands, the immediate result would be the destruction of this 75-year-old Veterans Memorial – causing pain and sorrow to veterans and their families across the Nation. Even worse, it could also presage the destruction of thousands of similar monuments and memorials nationwide, collectively inflicting pain upon our brave veterans and the families of our fallen heroes. If the Ninth Circuit's ruling stands, cherished monuments across the Nation built to honor our veterans will face the prospect of removal, defacement, or destruction. This Court's precedents do not support such an outcome, much less compel it. That is so for at least three reasons.

First, respondent lacks standing to challenge Congress's transfer of the Veterans Memorial to private hands. Respondent failed to plead, and offered no support of, any injury predicated upon such a transfer. Instead, respondent's amended complaint alleged injury based solely upon the display of the cross on *government* land. The record, however, conclusively establishes that respondent has no personal objection to the display of crosses on *private* land. The courts below, by construing the original injunction to

preclude transfer to a private party, granted respondent relief unsupported by his pleadings and for which he lacks standing.

Second, there is no Establishment Clause violation in need of cure under this Court's decision in *Van Orden*, which is controlling. In *Van Orden*, this Court made plain that "[s]imply having religious content * * * does not run afoul of the Establishment Clause." 545 U.S. at 690. The Veterans Memorial has stood for 75 years as a tribute to America's soldiers who paid the ultimate price in defense of freedom. For the first 65 years of its existence, the Memorial stood unchallenged without provoking any legal action or community dissension. The Memorial was constructed by private citizens, maintained by private citizens, and sits in the middle of 1.6 million acres of remote desert land. The federal government was not involved with the Memorial until it sought to save the Memorial from destruction by transferring it to *private* hands. And the government's actions since then have only confirmed the secular status of the Veterans Memorial.

Third, even if there were an Establishment Clause violation, Congress's transfer of the Veterans Memorial to the private ownership of Post 385 remedied it. Ordinarily, once government-owned land is transferred to private hands, state action terminates along with any alleged Establishment Clause violation. And none of the circumstances courts have identified as justifying disregard of a transfer exists in this case.

The Mojave Desert Veterans Memorial, like countless memorials to veterans throughout our Nation, reflects the respect and gratitude due our honored dead. No decision of this Court has ever suggested that those hallowed memorials are unconstitutional. Indeed, those memorials embody the very best traditions of our Nation and our Constitution, which serve to “secure the Blessings of Liberty to ourselves and our Posterity.”



ARGUMENT

I. Monuments in the Form of a Cross, Like the Veterans Memorial, Are Commonly Used to Honor American Soldiers Who Fought and Died During World War I.

The Veterans Memorial has stood for 75 years as a silent and solitary witness to the bravery and sacrifice of American soldiers who gave their lives in service to their country. The Memorial, which bears the form of a cross, is typical of many constructed in both the United States and Europe to commemorate soldiers who made the ultimate sacrifice during times of war.

Cross monuments are particularly common in cemeteries holding the remains of those killed during World War I. The loss of life that occurred on the Western Front during World War I remains shocking to this day. From the killing fields of Verdun to the American losses in the Meuse-Argonne Offensive,

soldiers died in unprecedented numbers. Those staggering losses moved surviving warriors to construct military cemeteries to commemorate the war dead. In most cases, a lone cross was chosen as an appropriate marker to memorialize the fallen.

Among the most famous memorials honoring fallen soldiers of World War I is the Cross of Sacrifice. Designed by British architect Sir Reginald Blomfield, the Cross of Sacrifice is a simple white Latin cross adorned with a bronze sword.⁵ The Cross of Sacrifice is frequently used as a World War I veterans memorial. From almost every shire in England to the Czech Republic to New Zealand, World War I memorials typically feature a lone cross.⁶

America likewise has honored its fallen soldiers by constructing large military cemeteries, many located on foreign soil. In Aisne-Marne,⁷ St. Mihiel,⁸

⁵ See Commonwealth War Graves Commission, Architecture, <http://www.cwgc.org/content.asp?menuid=2&submenuid=10&id=10&menuname=Architecture&menu=sub> (last visited June 3, 2009).

⁶ See, e.g., App., *infra*, 8a, 9a, 10a.

⁷ American Battle Monuments Commission, Aisne-Marne American Cemetery and Memorial, <http://www.abmc.gov/cemeteries/cemeteries/am.php> (last visited June 3, 2009).

⁸ American Battle Monuments Commission, St. Mihiel American Cemetery and Memorial; App., *infra*, 7a.

and Meuse-Argonne⁹ – the largest American military cemetery located on foreign soil – the white Latin cross is a ubiquitous sight. One of the most moving and well-known memorials to our veterans is the American cemetery in Colleville-sur-Mer, Normandy, France, with its row upon row of white crosses and “main paths * * * laid out in the form of a Latin cross.”¹⁰ The cemetery contains the remains of 9,387 soldiers who gave their lives during the Allied invasion of Europe that hastened the end of World War II.¹¹ The thousands of white Latin crosses and Stars of David that mark the graves of these brave soldiers are internationally recognized symbols honoring their ultimate sacrifice for the cause of freedom.

Veterans memorials in the shape of a cross can also be found across America. Perhaps most well known is the Cross of Sacrifice in Arlington National Cemetery. Donated by the Canadian Government, the 24-foot, solid granite cross honors Americans who joined the Canadian army – which entered the war well in advance of America – to fight in Europe.¹² Similarly, the Argonne Cross stands in Arlington

⁹ American Battle Monuments Commission, Meuse-Argonne American Cemetery and Memorial; App., *infra*, 1a.

¹⁰ American Battle Monuments Commission, Normandy American Cemetery and Memorial at 6-7, http://www.abmc.gov/cemeteries/cemeteries/no_pict.pdf (last visited June 4, 2009).

¹¹ American Battle Monuments Commission, <http://www.abmc.gov/cemeteries/cemeteries/no.php> (last visited June 3, 2009).

¹² See Arlington National Cemetery, Visitor Information, Monument and Memorials, *supra* n.4; App., *infra*, 3a.

National Cemetery amidst a grove of 19 pine trees – a 13-foot high marble monument to “OUR MEN IN FRANCE 1917 1918.”¹³

Other memorials include the French Cross Monument in Cypress Hill National Cemetery in New York,¹⁴ the Unknown Soldiers Monument in Prescott National Cemetery in Arizona,¹⁵ the Memorial Peace Cross in Maryland,¹⁶ the Wall of Honor at the Pennsylvania Military Museum,¹⁷ and countless others. And, of course, individual crosses mark the final resting places of America’s war heroes in military cemeteries across the Nation.¹⁸

¹³ See Arlington National Cemetery, Visitor Information, Monument and Memorials, *supra* n.2. Respondent may argue that private graves are different because they are personal choices of each soldier’s family. However, the cross memorials in Arlington are not graves and were installed by the government as government speech.

¹⁴ See United States Department of Veterans Affairs, Burial & Memorials, Cypress Hills National Cemetery, <http://www.cem.va.gov/cems/nchp/cypresshills.asp> (last visited June 3, 2009); App., *infra*, 5a.

¹⁵ See United States Department of Veterans Affairs, Burial & Memorials, Prescott National Cemetery, <http://www.cem.va.gov/cems/nchp/prescott.asp> (last visited June 3, 2009).

¹⁶ See Historical Marker Database, Peace Cross, <http://www.hmdb.org/marker.asp?marker=5187> (last visited June 3, 2009); App., *infra*, 6a.

¹⁷ See Pennsylvania Military Museum, Wall of Honor, <http://pamilmuseum.org/medals/medals.htm> (last visited June 3, 2009).

¹⁸ The centrality of cross imagery in military culture can also be seen in decorations such as the Distinguished Service Cross, the Distinguished Flying Cross, the Navy Cross, and the
(Continued on following page)

Those examples are only a few of the veterans memorials with religious imagery standing in silent testimony in military cemeteries, in public parks, and in town squares across the Nation. For centuries, memorials containing religious symbolism have evoked, honored, and solemnized the ultimate sacrifice made by this country's fighting men and women. If the Court holds that the existence of these monuments on government land gives rise to a constitutional violation, and the Court concludes that the transfer of the land to private parties does not cure that violation, the only remaining option would be the removal, defacement, or destruction of countless cherished memorials across the Nation.¹⁹

Air Force Cross. See United States Armed Forces Awards, Decorations, Campaign & Service Medals, <http://www.tioh.hqda.pentagon.mil/Awards/Ribbons/OrderofPrecedence.htm> (last visited June 3, 2009).

¹⁹ It is no answer to say, as respondent does, that removal would not necessarily be required because the land upon which the Veterans Memorial and others like it stand could simply be sold to the highest bidder. See Br. in Opp. at 28-29. That is cold comfort to veterans and their families. An auction would do nothing to prevent the purchasers from subsequently destroying or altering the memorials, much less ensure their continued maintenance and protection. Instead, the memorials honoring the ultimate sacrifice that these veterans made for our country's freedom would simply be up for sale to the highest bidder.

A. World War I Veterans Constructed the Memorial to Honor Their Fallen Comrades.

The Veterans Memorial was built in 1934 by members of a local VFW post who were living in the eastern region of the Mojave Desert. Many were veterans of World War I who moved to the desert on the advice of physicians to recover from “shell shock” and other physical and emotional maladies. Once there, many became miners, ranchers and prospectors. They also formed VFW posts throughout the region.²⁰

Those veterans selected Sunrise Rock as an appropriate place to erect a memorial – in part because they believed there was a color shading on the Rock in the shape of an American soldier or “doughboy.” See App., *infra*, 12a. The veterans memorialized their intent to commemorate their fallen comrades on a plaque accompanying the monument that read: “The Cross, Erected in Memory of the Dead of All Wars, erected in 1934 by Members Veterans of Foregin [sic] Wars, Death Valley Post 2884.” *Buono v. Norton*, No. 05-55852, Appellee’s Excerpts of Record at 11, 14 (hereinafter “Appellee’s Excerpts of Record”). The bottom portion of the plaque was decorated with VFW decals. *Id.* at 20. The original memorial was

²⁰ VFW Department of California, Mojave Desert Veterans Memorial, http://www.vfwca.org/images/memorial_write_up_final.pdf (last visited June 5, 2009).

constructed of metal pipe and painted white. *Ibid*; App., *infra*, 13a.

Beginning in 1934, a local resident named John Riley Bembry assumed responsibility for maintaining the Memorial. Mr. Bembry served in the U.S. Army during World War I as a medic. After the war, he moved to the Mojave Desert and began staking out small mining claims. Mr. Bembry lived in a makeshift mining camp roughly seven miles north of the Veterans Memorial. He was a member of Death Valley VFW Post 2884. See VFW Department of California, Mojave Desert Veterans Memorial, *supra* n.20.

Although not a religious man, Mr. Bembry faithfully cared for the Memorial for nearly 50 years until his death in 1984. After vandals destroyed the original Memorial, Mr. Bembry, his health failing, asked his close friend and fellow desert resident Henry Sandoz to replace it. Agreeing to the request, Mr. Sandoz erected a new cross made of wood. Mr. Bembry died before replacing the plaque. *Ibid*.

Before his death, Mr. Bembry asked Mr. Sandoz to assume care for the Memorial. Mr. Bembry told Mr. Sandoz that the Memorial meant a great deal to him and that he viewed his caretaking duties as his obligation to his comrades who paid the ultimate price during World War I. Moved by his friend's commitment and dedication, Mr. Sandoz agreed to assume responsibility to care for the Memorial. Mr. Sandoz,

who had not served in the military, viewed his caretaking role as an opportunity to serve American veterans and thank them for their sacrifice. *Ibid.*

In 1986, after the Veterans Memorial was again vandalized and some nearby graves were desecrated, Mr. Sandoz decided to restore the Memorial to its original form. Using an old photograph of the original Memorial as a guide, see App., *infra*, 13a, Mr. Sandoz made a cross out of four-inch metal pipe and painted it white. He then bolted the cross to Sunrise Rock and filled it with concrete to discourage vandalism. After restoring the Veterans Memorial, Mr. Sandoz continued to care for it. See VFW Department of California, Mojave Desert Veterans Memorial, *supra* n.20.

B. The United States Has Consistently Recognized the Memorial's Status as a War Memorial and Has Taken No Action That Could Fairly Be Interpreted as Advancing or Endorsing Religion.

The Veterans Memorial stood without legal challenge for approximately 65 years. During that time, the federal government took no action whatsoever with respect to the Memorial. Nor did members of the local community, or tourists who visited the Mojave National Preserve, object to the presence of the Memorial on government land or raise any legal challenge to it.

That lengthy period of tranquility ended on October 6, 1999, when the ACLU sent a demand letter to

the Regional Director of the NPS and the Superintendent of the Mojave National Preserve requesting removal of the Veterans Memorial on Establishment Clause grounds. Appellee's Excerpts of Record at 4-5. Every act taken by the federal government since then has only confirmed the secular status of the monument as a memorial to fallen soldiers. For example, in a response to the initial demand letter, Assistant Field Solicitor Larry Bradfish of the Department of the Interior observed that the original memorial "was erected in 1934 by a local VFW post in honor of war dead." *Id.* at 6. Responding to a second demand letter, John Reynolds, Regional Director of the Pacific West Region of the NPS, noted that the original memorial was "believed to have been erected in 1934 by members of a local Veterans of Foreign Wars chapter along with a wooden plaque commemorating the fallen veterans of World War I." *Id.* at 15. A research memorandum drafted by Mark Luellen, a historian in the Pacific Great Basin Support Office of the NPS, concluded that the memorial "was erected by the Veterans of Foreign Wars in 1934 as a memorial to honor the war dead," and that the "general appearance of the memorial is largely the same as it was in 1934" with only the commemorative plaque missing. *Id.* at 20.

Despite those attestations to the secular purpose of the Veterans Memorial, the Superintendent of the Mojave National Preserve unfortunately announced to her staff on October 6, 2000, that she intended to

remove the Memorial. She pointed specifically to the threat of “personal damages against those government officials that knew about the cross, yet did not remove it” as the reason for her decision. *Id.* at 24. Shortly thereafter, and before the Memorial could be removed, Congress enacted legislation to prohibit the Secretary of the Interior from expending any funds to remove the Memorial. Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 133, 114 Stat. 2763A-230 (Dec. 21, 2000). One year later, Congress designated the Veterans Memorial as a “national memorial commemorating United States participation in World War I and honoring the American veterans of that war.” Department of Defense Appropriations Act, 2002, Pub. L. No. 107-117, Div. A, § 8137(a), 115 Stat. 2278. Congress also directed that not more than \$10,000 be used by the Department of Interior to “acquire a replica of the original memorial plaque and cross placed at the national World War I memorial * * * and to install the plaque in a suitable location on the grounds of the memorial.” § 8137(b), 115 Stat. at 2278-79.

Far from endorsing (or even mentioning) religion, Congress’s actions reaffirmed the historical purpose of the Veterans Memorial – to honor America’s war dead. Indeed, by mandating the reinstallation of the original plaque, Congress explicitly endorsed the longstanding secular purpose of the Memorial. Despite those efforts, the district court ruled that the Veterans Memorial offended the Constitution and

ordered the Memorial's removal. The Memorial was then covered by a tarpaulin sack. App., *infra*, 2a. Congress responded by enacting legislation requiring the Secretary to convey the Veterans Memorial to the Veterans of Foreign Wars Post 385. Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, § 8121(a), 117 Stat. 1100 (requiring conveyance of the real property "designated * * * as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war").

II. Respondent Lacks Standing to Challenge the Government's Transfer of the Veterans Memorial to Private Hands.

Petitioners correctly argue that respondent lacks standing to challenge the transfer of the Veterans Memorial to private ownership because his ideological objection to that transfer does not constitute an injury in fact under *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982). Pets.' Br. at 12-19. *Amici* respectfully suggest that respondent lacks standing for yet another reason: He failed to plead or offer alleged support for *any* injury arising from the transfer. Respondent's amended complaint alleged injury arising solely out of the Memorial's display on *government* land. J.A. 50. By nonetheless construing the original injunction to preclude transfer of the Memorial to a *private* party, the courts below erred in

granting respondent relief for which he lacks standing.²¹

A. Standing Is Determined by the Presence Or Absence of a “Distinct and Palpable Injury” That Must Exist At All Stages of the Litigation.

A plaintiff must “demonstrate standing separately for each form of relief sought.” *Friends of the Earth, Inc. v. Laidlaw Env’tl Servs., Inc.*, 528 U.S. 167, 185 (2000). To demonstrate standing, a claimant must present an actual or threatened injury that is fairly traceable to the challenged action and likely to be redressed by a favorable ruling. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The injury must be concrete, particularized, “distinct and palpable.” *Gollust v. Mendell*, 501 U.S. 115, 126 (1991).

The standing elements “are not mere pleading requirements but rather an indispensable part of the plaintiff’s case.” See, e.g., *Lujan*, 504 U.S. at 561. Each element “must be supported in the same way as any other matter on which the plaintiff bears the

²¹ There is nothing to be gained by allowing respondent to attempt to cure his standing problem. That problem is incurable because respondent has already judicially admitted that he is not an offended observer of the Memorial in private hands. J.A. 50 (stating that “Mr. Buono has no objection to Christian symbols on private land * * *”).

burden of proof.” *Ibid.* A plaintiff’s failure to provide factual support for each allegation of injury for which he seeks relief necessarily results in a lack of standing. *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 497 (5th Cir. 2007) (*en banc*) (no standing where plaintiff did not offer evidence he was exposed to invocations at any meeting sponsored by defendant). Where, as here, a court grants relief that a plaintiff has no standing to seek, that judgment is subject to reversal. *Id.* at 499.

B. There Is No Basis in the Record For an Injury Arising From the Challenged Transfer of the Veterans Memorial.

The record is devoid of any evidence that respondent would be injured by the government’s transfer of the Veterans Memorial to the private ownership of the VFW. To the contrary, respondent’s own evidence conclusively establishes that transferring the Memorial to a private party would *cure* all injuries originally alleged. For example, in his amended complaint, respondent sought an injunction to restrain the federal government “from continuing to allow the display of this sectarian symbol *on government-owned land.*” J.A. 49 (emphasis added). Respondent specifically averred that he had “no objection to Christian symbols on private property,” and only took offense at “the display of a Latin Cross on *government-owned* property – property that is not open to groups and individuals to erect other freestanding, permanent displays.” J.A. 50 (emphasis added).

In his deposition, respondent reaffirmed his alleged injury:

Q: “The only thing that’s offensive about this cross is that you’ve discovered that it’s located on federal land?”

A: “Correct.”

J.A. 85.

The district court’s original injunction recognized the limited scope of respondent’s alleged injury: “A practicing Roman Catholic, Buono does not find a cross itself objectionable, but stated that the presence of the cross is objectionable because it rests on federal land.” *Buono v. Norton*, 212 F. Supp. 2d 1202, 1207 (C.D. Cal. 2002); *id.* at 1217 (“the presence of the cross on the federal land portion of the Preserve is unconstitutional”). After Congress ordered the transfer of the Memorial to the VFW, respondent filed a Motion to Enforce, or in the Alternative, Modify the Permanent Injunction, stating that:

[T]he land transfer [Section 8121] effects [sic] violates the Establishment Clause. Accordingly, Plaintiff respectfully request[s] that the Court either hold that Section 8121 violates its July 24, 2002, permanent injunction, and prohibit its implementation, or modify the injunction explicitly to prohibit Defendants from implementing Section 8121.

Appellee’s Excerpts of Record at 101. Thus, respondent’s motion effectively added a new claim for relief alleging not only that the *presence* of the Memorial on

government land, but also the *transfer* of the Memorial violates the Establishment Clause.

Even assuming respondent had standing to seek an injunction restraining the federal government from *displaying* the cross on federal land, respondent's alleged injury – offense engendered by a cross on *government* land – cannot create standing for his separate, discrete request for an injunction restraining the federal government from *transferring* the land on which the cross stands to private hands. See *Lewis v. Casey*, 518 U.S. 343, 358, n.6 (1996) (“standing is not dispensed in gross”). Respondent bears the burden to “demonstrate standing separately” for this new “form of relief.” *Friends of the Earth, Inc.*, 528 U.S. at 185. He cannot satisfy that burden because there is no evidence in the record of any injury fairly traceable to the transfer of the Veterans Memorial that can be redressed by a favorable ruling. See *Lujan*, 504 U.S. at 561.

Indeed, respondent has never disclaimed his previous statement that he has “no objection to Christian symbols on private property.” J.A. 50. Respondent's attempt to enjoin the transfer is thus foreclosed by the “long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings, but rather must affirmatively appear in the record.” *Spencer v. Kemna*, 523 U.S. 1, 10-11 (1998) (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990) (citations omitted)).

This Court’s recent decision in *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006), confirms that conclusion. In that case, this Court held that Article III jurisdiction over an original claim does not extend to a new claim simply because they both “derive from a common nucleus of operative facts.” *Id.* at 351 (rejecting application of supplemental-jurisdiction test in the standing context). As the Court explained, if the standing requirement were “commutative,” then this Court’s insistence that “a plaintiff must demonstrate standing separately for each form of relief sought * * * would make little sense.” *Id.* at 352 (internal quotation marks and citation removed). Similarly, if this Court’s teaching that standing must be demonstrated for each form of relief can be evaded merely by broadening the scope of an injunction to grant relief for which respondent lacks standing, then this Court’s articulations of what Article III requires “would be rendered hollow rhetoric.” *Id.* at 353 (citing *Lewis*, 518 U.S. at 357).

III. The Government’s Transfer of the Veterans Memorial to Private Hands Raises No Establishment Clause Concerns.

Despite the clear and unmistakable language Congress used when transferring the land at issue in requiring it to be used solely as a memorial to the veterans of World War I, the Ninth Circuit held that Congress had impermissibly sought to evade the district court’s injunction barring the federal government from perpetuating an Establishment Clause

violation on federal land. *Buono v. Kempthorne*, 527 F.3d 758, 782 (9th Cir. 2008) (“We also agree that ‘the proposed transfer of the subject property can only be viewed as an attempt to keep the Latin Cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation.’” (quoting *Buono v. Norton*, 364 F. Supp. 2d 1175, 1182 (C.D. Cal. 2005))). That conclusion is incorrect for two reasons. First, the transfer could not have perpetuated an Establishment Clause violation because one did not exist in the first place. This Court’s decision in *Van Orden v. Perry*, 545 U.S. 677 (2005), compels the conclusion that the mere presence of the Veterans Memorial on federal land did not violate the Establishment Clause. Second, even if there were an Establishment Clause violation, the congressionally mandated transfer of the Veterans Memorial to the VFW cured it. “[A]bsent unusual circumstances, a sale of real property is an effective way for a public body to end its [alleged] inappropriate endorsement of religion.” *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000); *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 702-03 (7th Cir. 2005).

A. The Presence of the Veterans Memorial on Federal Land Is Permissible Under *Van Orden*.

In *Van Orden*, a plurality of this Court adopted a context-specific, fact-driven analysis for assessing claims, like the one in this case, that a passive monument violates the Establishment Clause. 545 U.S. at

686.²² Likewise, Justice Breyer’s opinion concurring in the judgment agreed that in Establishment Clause cases involving longstanding passive monuments, there is “no * * * substitute for the exercise of legal judgment.” *Id.* at 700 (Breyer, J., concurring in the judgment). In this case, the presence of the Veterans Memorial on federal land is permissible when evaluated in light of the monument’s nature, history, and context, as *Van Orden* requires. Any other result would “exhibit a hostility toward religion that has no place in our Establishment Clause traditions.” *Id.* at 704 (Breyer, J., concurring in the judgment). Indeed, Justice Breyer focused in particular on the extended period of time that the Texas monument had stood without controversy and on the lack of divisiveness those decades reflected:

This display has stood apparently uncontested for nearly two generations. That experience helps us understand as a practical matter of *degree* this display is unlikely to prove divisive. And this matter of degree is, I

²² If the Court is inclined to adopt the coercion test articulated by Justice Kennedy in *County of Allegheny v. ACLU*, 492 U.S. 573, 659-63 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part), this case presents an ideal vehicle to do so. Under that test, the Mojave Desert Veterans Memorial easily survives constitutional scrutiny. See *id.* at 662 (“[W]here the government’s act of recognition or accommodation is passive and symbolic * * * any intangible benefit to religion is unlikely to present a realistic risk of establishment.”).

believe, critical in borderline cases such as this one.

Ibid. (Breyer, J., concurring in the judgment). Under *Van Orden*, the present case is straightforward. In every respect, the arguments supporting the constitutionality of the Veterans Memorial are stronger and more compelling than those in *Van Orden*.

First, the sole historical purpose of the Memorial is to commemorate fallen war veterans, just as similar memorials commemorate fallen soldiers the world over. The Memorial was constructed by members of a private organization, the VFW, dedicated to serving America's veterans. It was maintained for 30 years by a proud veteran of the First World War in memory of his fallen comrades. It was then maintained from 1984 until 1999 by a man seeking only to honor his country's warriors and the memory of his friend. And, until the Memorial was threatened with destruction, the federal government's only "action" with respect to the Memorial had been benign neglect.

Second, the VFW, an indisputably secular organization, erected and has overseen the maintenance of the Veterans Memorial – not the government. Indeed, the VFW never even donated the Veterans Memorial to the government. The VFW originally erected the Memorial without any government approval and has seen to its maintenance throughout the Memorial's history. And contrary to respondent's contentions, see

Br. in Opp. at 19-20, the government's recognition of the Veterans Memorial as a war memorial has not altered the VFW's responsibility to care for and maintain the monument.

Third, "the circumstances surrounding the display's placement * * * and its physical setting" in the Mojave Desert suggest little of the sacred or the sectarian. See *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in the judgment). Although a passerby, uneducated about the history of the Veterans Memorial, might perceive the cross as a religious symbol, the question under *Van Orden* is not whether the monument has facially religious content, but "how the [content] is *used*." *Ibid.* (Breyer, J., concurring in the judgment). The context and history of the Ten Commandments monument in *Van Orden* suggested that the State "intended the * * * nonreligious aspects of the tablets' message to predominate" by conveying "an illustrative message reflecting the historical 'ideals' of Texans." *Id.* at 701-02 (Breyer, J., concurring in the judgment). Here, it is even clearer that the Memorial's predominant message – to commemorate American war dead – is secular because similar monuments are used for similar purposes throughout the world. Given that history – and the remote location of the Memorial – it is not surprising that the Veterans Memorial stood without legal challenge or community complaint for 65 years until this litigation.

By any measure, the Ten Commandments monument upheld in *Van Orden* was more closely tied to

religion, had a shorter history, and was located in a far more prominent and public space than the Veterans Memorial. The *Van Orden* monument is covered with indisputably religious text, including “I AM THE LORD THY GOD” as its pinnacle; in contrast, the Veterans Memorial has no religious writing at all on its plaque, only a dedication to the “Dead of All Wars.” The *Van Orden* monument sat undisturbed and without controversy for over 40 years; the Veterans Memorial sat undisturbed and without controversy for nearly twice as long. And the *Van Orden* monument sits today within 100 feet of the Texas Capitol; in contrast, the Veterans Memorial sits in the middle of 1.6 million acres of remote desert land.

To be sure, a cross is an indisputably religious image, but not nearly to the degree that is a direct physical representation of the baby Jesus, upheld by this Court in *Lynch v. Donnelly*, 465 U.S. 668 (1984). And not nearly to the degree of the Ten Commandments, a text sacred to millions and believed to have been written by the hand of God Himself. Moreover, the cross has a far more marked secular significance, given its ubiquity commemorating veterans memorials throughout the world.

Indeed, the content of the *Van Orden* monument was determined by a panel of religious leaders of different faiths; in contrast, the content of the Veterans Memorial was determined by World War I veterans returning from a global war to acknowledge their dead comrades in the same way they observed similar

European acknowledgements. The *Van Orden* monument acknowledged religion; the Veterans Memorial acknowledges our veterans.

Just as the Ten Commandments, while unquestionably religious, have also had a significant secular impact on law and culture, so also has the image of a cross, while unquestionably religious, had for centuries a prominent role in commemorating veterans. The image of the Ten Commandments – carved into the very courtroom of this Court numerous times – reflected that dual history, just as do the thousands and thousands of crosses throughout the world, commemorating veterans who have given their lives in service.

In sum, the monument upheld in *Van Orden* presented a much closer question under the Establishment Clause than the Veterans Memorial under attack here. With no Establishment Clause violation to remedy, the transfer of the Veterans Memorial to private ownership could not have perpetuated any such “continuing” violation.

B. The Transfer of the Veterans Memorial to Private Hands Remedied Any Establishment Clause Violation.

Even if there were an Establishment Clause violation here, the congressionally mandated transfer of the Veterans Memorial from the federal government to the private ownership of the VFW cured it. Ordinarily, once government-owned land is transferred

to a private party, state action terminates along with any alleged violation of the Establishment Clause. *Marshfield*, 203 F.3d at 491-92. None of the “unusual circumstances” that could justify disregarding a transfer is present in this case. See *id.* at 492.²³

The Seventh Circuit has observed that where a transfer does not “comply with applicable state law,” is made to a “straw purchaser” for purposes of allowing continued government control, involves a sales price “well below fair market value,” or takes place in a location where “the presence of the government is pervasive and inescapable,” a transfer may not cure the alleged Establishment Clause violation. *Mercier*, 395 F.3d at 702-03 (citations omitted); *Marshfield*, 203 F.3d at 492. None of those “unusual circumstances” exists here. The federal law transferring the property was properly approved, Post 385 is the true

²³ Respondent advances several arguments against the land transfer acting as a cure. None has merit. First, respondent argues that state action has not terminated because the Memorial remains designated as a veterans memorial by the federal government. Br. in Opp. at 19. Such an argument would not only invalidate countless veterans memorials, but also misses the mark. If the designation is the violation, the remedy is not removing the Memorial but rather the designation. Second, respondent’s argument that because the Mojave Preserve is mostly government land, a veterans memorial bearing religious imagery, even if on private property, violates the Establishment Clause proves too much. See *id.* at 19. It would render any religious symbol on privately held ranches in the Mojave Preserve equally constitutionally offensive. Under respondent’s theory, the government would have an obligation to root out those private displays and remove them.

recipient of the property, and the government is receiving market value in the form of a similarly sized parcel of land in exchange. The control and maintenance of the one-acre plot would be fully ceded to Post 385. And the monument is located in the middle of a remote desert preserve, with no perceptible government presence in the vicinity – much less a “pervasive and inescapable” one.

The government’s motive for the transfer is immaterial to the Establishment Clause inquiry, because once state action terminates there can be no continuing constitutional violation. Thus, even where the government transfers property in response to an Establishment Clause challenge, the transfer remains effective to cure any constitutional violation. See *Mercier*, 395 F.3d at 702 (acknowledging that the transfer occurred when the city faced a lawsuit for the removal of the memorial); *Marshfield*, 203 F.3d at 491 (upholding the transfer even though it was intended to circumvent the government action requirement). That makes perfect sense. A government’s good-faith efforts to divest itself of a challenged monument should not somehow be held against it.

That principle should apply with particular force in this case, where respondent has never offered any evidence that the federal government ever had *any* motive other than honoring veterans. Especially in a time of war, such action is deserving of respect – not condemnation as a violation of the Constitution.

If anything, the potential for inflicting pain on the families of our fallen heroes by removing, destroying, or altering veterans memorials based on allegations that they violate the Establishment Clause highlights the importance of transfer as a constitutional “safety valve” to prevent the defacement and destruction of these memorials. That way, a government entity faced with a colorable Establishment Clause claim at least has the opportunity to transfer the property to a responsible private party who can preserve and maintain these historic war memorials.

C. The Issue of Transfer is Not Moot.

Respondent contends that this case may be moot because Post 385 briefly became defunct after Congress ordered the transfer of the Veterans Memorial. That is not so. Upon Post 385’s becoming defunct, all of its property interests – including its vested present interest in the Memorial – passed immediately to the VFW Department of California, as dictated by the VFW bylaws. The VFW Department of California stands ready as Post 385’s successor-in-interest to receive the transfer of the Memorial if this Court vacates the injunction. In addition, Post 385 is now “restored to good working order” and committed to preserving and protecting the Veterans Memorial. App., *infra*, 20a. Consequently, the dispute over the constitutionality of transfer is not moot.

1. The VFW Department of California is Post 385's successor-in-interest, and therefore the case is not moot.

The dissolution of an organization such as Post 385 does not moot a live controversy where, as here, the action would affect the rights of a valid successor-in-interest. See *Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 674 (1944); *United States v. Zolin*, 491 U.S. 554, 557 n.3 (1989) (death of a party does not render a case moot when the case could affect a party's estate); *Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631, 638 (1949) (noting that the Court "adheres to the familiar rule that a judgment against or in favor of a corporation is not erased by subsequent dissolution"). Although Post 385 briefly became defunct, the case is not moot because Post 385's vested interest in the Veterans Memorial passed to the VFW Department of California, its successor-in-interest, under VFW bylaws.

In 2007, three years after Congress enacted Section 8121 and granted a present interest in the land underlying the Veterans Memorial to Post 385, the Post failed to satisfy VFW administrative requirements in filing its convention registration. The Post's charter was revoked, and it became defunct. In that instance, the VFW bylaws call for the relevant state department – here the VFW Department of California – to assume ownership of Post 385's property, including its interest in the Memorial. Under Section 212 of the bylaws, when a local post becomes defunct, "the property of the Post shall be handled as

prescribed in Section 210” of the corresponding Manual of Procedure, which reads:

In case of surrender or forfeiture of a charter, all of the property of the Post, including real property, books of record and papers and money belonging to it, *shall be immediately recovered* by the District and turned over to the Department for disposition as directed by the Department Council of Administration for the purposes set forth in the Congressional Charter.

App., *infra*, 16a (emphasis added). Pursuant to the bylaws, the VFW Department of California did in fact assume ownership over Post 385’s property, including its interest in the Veterans Memorial.²⁴ As the successor to Post 385 and owner of the present interest in the Veterans Memorial conveyed by Section 8121, the VFW Department of California possesses a live stake in this controversy.

²⁴ This has been the VFW’s standard procedure for many decades. See, e.g., *Veterans of Foreign Wars, Post No. 837 v. Byrom*, 357 S.W.2d 426 (Tex. Civ. App. 1962) (following revocation of a post’s charter the VFW state department claimed the post’s property under the national bylaws); *Chaplain Kieffer Post 1081 v. Wayne County Veterans Ass’n*, 1988 Ohio App. LEXIS 3815, at *1-2 (Ct. App. Sept. 21, 1988).

2. Post 385's interest in the Veterans Memorial vested immediately upon the enactment of the transfer statute.

Respondent does not dispute that, as a general matter, the VFW Department of California can receive the conveyance of the Veterans Memorial as Post 385's successor-in-interest. Br. in Opp. at 32. Instead, respondent contends that Post 385's interest in the Memorial never vested. That is incorrect. Post 385 received a present, vested interest in the Memorial when Congress enacted the transfer statute, which plainly dictates that "in exchange for the private property described in subsection (b), the Secretary of the Interior *shall convey* to the Veterans Home of California – Barstow, Veterans of Foreign Wars Post #385E * * * all right, title, and interest of the United States in and to" the Memorial. Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, Div. A, § 8121(a), 117 Stat. 1100 (emphasis added). The statute also defined the terms of payment (a land exchange), and provided for an appraisal and cash equalization, if necessary to ensure a fair exchange. *Id.* § 8121(b)-(d). This Court has long held that statutory land grants, such as the transfer statute at issue here, convey a vested, present interest in the land designated even if the land itself has yet to be transferred. See, e.g., *Deseret Salt Co. v. Tarpey*, 142 U.S. 241, 253 (1891); *Leavenworth, L. & G. R.R. v. United States*, 92 U.S. 733, 741 (1875); *Rutherford v. Greene's Heirs*, 15 U.S. (2 Wheat.) 196 (1817).

Respondent resists that conclusion by claiming that the transfer statute contains “conditions precedent” that must be satisfied before an interest vests in Post 385. Br. in Opp. at 32-33. But the text of the statute belies that contention. The statute provides that “in exchange for” and “as consideration for” the land provided by the Sandozes, the Secretary “shall convey” the Veterans Memorial. Pub. L. No. 108-87, Div. A, § 8121(a), 117 Stat. 1100. It is black-letter law that “payment of the consideration is not a condition precedent.” *Forum Inv. Co. v. Cement Stave Silo Co.*, 219 F. 213, 218 (8th Cir. 1914); see also 3 Richard A. Lord, *Williston on Contracts* § 7:18 (4th ed. 2008). The requirements for an appraisal and potential cash payment in order to ensure a fair exchange are part and parcel of the consideration required, not conditions precedent.

This Court has repeatedly rejected arguments that the need for future action prevents the vesting of a statutory land grant. *Rutherford*, 15 U.S. at 196 (statute providing that “twenty-five thousand acres of land shall be allotted for and given to Major General Nathaniel Greene” created vested and transferable interest); *Schulenberg v. Harriman*, 88 U.S. 44, 62 (1874) (statute’s words “must be taken in their natural sense to import immediate transfer of title, although subsequent proceeding may be required to give precision to that title”); *Leavenworth*, 92 U.S. at 741 (explaining that statute “[vested] a present title in the State of Kansas though a survey of the lands and a location of the road are necessary to give

precision to it”); *Deseret Salt Co.*, 142 U.S. at 253 (statute’s provision that “before any land granted by the act shall be conveyed * * * there shall first be paid * * * the cost of surveying, selecting, and conveying the same” was not “designed to impair the force of the operative words of transfer”). Just as in those cases, Congress here granted Post 385 a present interest in the Veterans Memorial subject only to future actions to effect the conveyance. Post 385’s present interest was thus fully transferable to its successor-in-interest.

In addition, Post 385 is now fully operational and stands ready with the VFW Department of California to preserve the Veterans Memorial. App., *infra*, 20a. Thus, even if the VFW Department of California could not serve as the successor-in-interest, Post 385 would still be standing ready to receive its property interest. Either way, respondent’s mootness argument fails.



CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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American Battle Monuments Commission,
Meuse-Argonne American Cemetery and Memorial,
<http://www.abmc.gov/cemeteries/cemeteries/ma.php>
(last visited June 5, 2009).



Mojave Desert Veterans Memorial, covered with a bag.

Photo by Eric Reed,
www.ericreedphoto.com.



Canadian Cross of Sacrifice,
WWI Memorial, Arlington National Cemetery,
<http://www.arlingtoncemetery.net/canadian-cross.htm>
(last visited June 5, 2009).



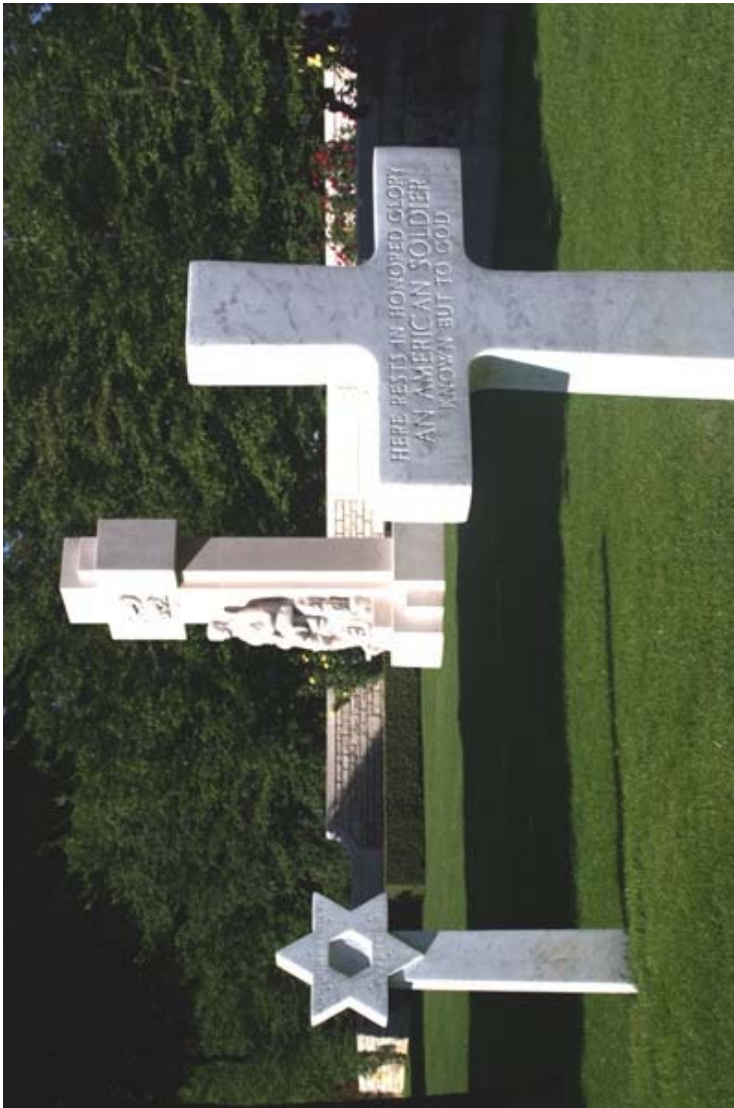
Arlington Cemetery Argonne Cross, WWI Memorial
“IN MEMORY OF OUR MEN IN FRANCE 1917 1918”
Arlington National Cemetery,
<http://www.arlingtoncemetery.net/argonne-cross.htm>
(last visited June 5, 2009).



French Cross Monument, WWI Memorial
Cypress Hill National Cemetery in New York



Memorial Peace Cross
WWI Memorial in Maryland,
<http://www.waymarking.com/waymarks/WMK1G>
(last visited June 5, 2009)



St. Mihiel American Cemetery,
American Battle Monuments Commission,
St. Mihiel American Cemetery and Memorial,
<http://www.abmc.gov/cemeteries/cemeteries/sm.php>
(last visited June 5, 2009).

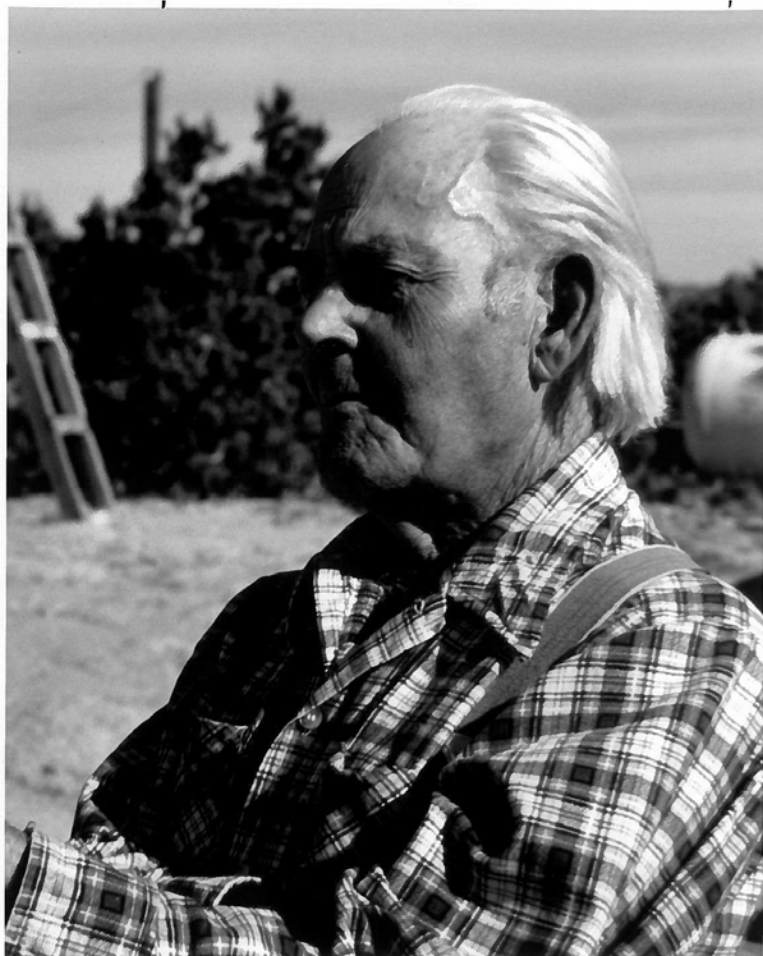


WWI Memorial Aylesbury
Cross of Sacrifice, United Kingdom,
[http://www.waymarking.com/waymarks/WM3QY4_
Aylesbury_Cross_of_Sacrifice](http://www.waymarking.com/waymarks/WM3QY4_Aylesbury_Cross_of_Sacrifice) (last visited June 5, 2009)

World War I Memorial
Hosin Village, Czech Republic,
http://www.waymarking.com/waymarks/WM194C_WW_I_Memorial_Hosin_Village_Czech_Republic
(last visited June 5, 2009)



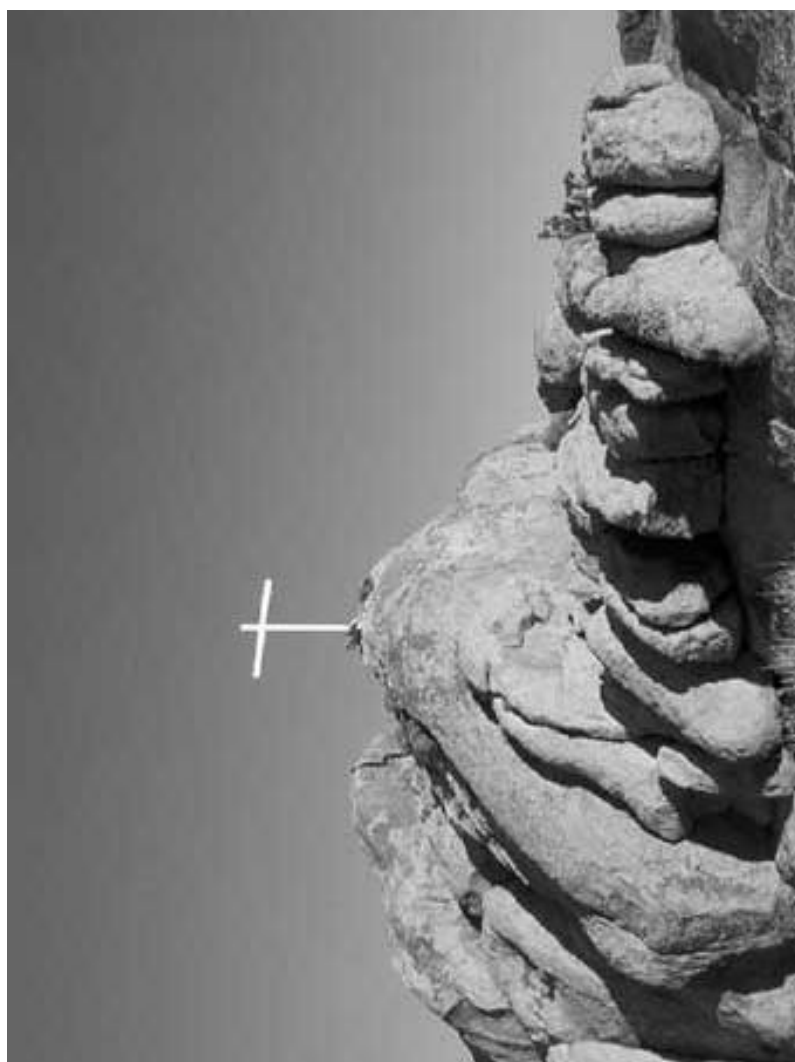
World War I Memorial in New Zealand



Riley Bembry
Photo by Dennis Casebier



Gathering of Veterans
Observing "Doughboy" Shading
circa 1934



Original Mojave Desert Veterans Memorial,
[http://www.nps.gov/archive/moja/adminhist/
images/fig11.jpg](http://www.nps.gov/archive/moja/adminhist/images/fig11.jpg) (last visited June 5, 2009).

MANUAL OF PROCEDURE

Sec. 209 – Consolidation of Posts.

Two or more Posts may consolidate upon a vote of their respective members conducted in accordance with the procedures herein set forth as follows:

1. A motion to consider consolidation shall be made and approved at a stated meeting of the Posts.
2. A committee shall be appointed by the Post Commander to investigate consolidation.
3. All Posts involved in the consolidation shall exchange a report of all assets and liabilities.
4. A Post may then, after at least twenty (20) days written notice to the Department Commander and members of the respective Posts, consolidate upon a two-thirds ($\frac{2}{3}$) vote of the members present and voting at each stated Post meeting.
5. The Department Commander shall be notified, in writing, immediately after the meeting of the outcome of the action taken.
6. A Department representative shall conduct a joint meeting of all Posts within thirty (30) days for the purpose of determining the name, number (must be one of the consolidating Post numbers), location of the consolidated Post and the election and installation of officers. A written notice must be sent to the members of all Posts involved at least fourteen (14) days in advance. All actions, with the exception of the election of officers,

must be approved by a two-thirds ($\frac{2}{3}$) vote of the members present at the stated meeting.

7. Such facts shall be certified by the Department representative, submitted to the Department Commander for forwarding to the Commander-in-Chief who shall issue a Certificate of Charter reciting the facts of such consolidation. The Certificate of Charter shall rank from the date of the senior Post's charter.

The property of each of the Posts shall be conveyed to and become the property of the consolidated Post. All past officers in each Post shall be entitled to rank as of date of service in their respective Posts.

Sec. 210 – Surrender of Charter.

A Post may surrender its charter in accordance with the procedures herein set forth as follows:

1. *A motion to consider surrendering a Post charter shall be made and approved at a stated meeting of the Post. If approved, the Post Commander shall immediately provide the Department Commander with a list describing all assets and liabilities of the Post.*
2. *A Post may then, after at least twenty (20) days written notice to the Department Commander and members of the Post, vote to surrender the charter upon a two-thirds ($\frac{2}{3}$) vote of the members present and voting at a stated meeting.*

3. *The Department Commander shall be notified immediately after the meeting, in writing, of the outcome of the vote to surrender the charter of a Post. If approved, the Department Commander shall within thirty (30) days, request that the Commander-in-Chief cancel the charter. Pending such cancellation the Post shall not dispose of any assets.*

Disposition of Property. *In case of surrender or forfeiture of a charter, all of the property of the Post, including real property, books of record and papers and money belonging to it, shall be immediately recovered by the District and turned over to the Department for disposition as directed by the Department Council of Administration for the purposes set forth in the Congressional Charter.*

In case of surrender or forfeiture of a charter, the Department Council of Administration in the case of trust funds or trust property, or both, shall carry out the intent and purpose of such trust to the extent of such funds or property, or both.

Sec. 211 – Suspension and Revocation of Charter.

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[LOGO]

CONGRESSIONAL CHARTER
BY-LAWS
MANUAL OF PROCEDURE
RITUAL

As amended August 21, 2008
Effective September 20, 2008

* * *

Authorized Attendees. Any member of the Post and those on official business shall be recognized by the Post Commander for the conduct of business.

Guests. *With the approval of the Post Commander/Committee Chairman, any member or guest may attend a Post/Committee meeting. Such visiting member or guest shall have no voice unless recognized by the Post Commander/Committee Chairman, and shall have no voting privileges.*

Sec. 204

Sec. 205

**Sec. 206 – Change of Location, Meeting Place,
Day or Time.**

A Post may change its chartered location, meeting place, meeting day or time as prescribed in Section 206 of the Manual of Procedure.

Sec. 207

Sec. 208 – Change of Name.

A Post may change its chartered name as prescribed in Section 208 of the Manual of Procedure.

Sec. 209 – Consolidation of Posts.

Two or more Posts may consolidate by authority of the Commander-in-Chief as prescribed in Section 209 of the Manual of Procedure.

Sec. 210 – Surrender of Charter.

A Post may surrender its charter only upon a vote of its members as prescribed in Section 210 of the Manual of Procedure.

Sec. 211 – Suspension and Revocation of Charter.

Actions by the Commander-in-Chief – Suspension. *The Commander-in-Chief may suspend a Post Charter for a period of up to six (6) months for violations of the National By-Laws and Manual of Procedure.*

Establishment of Trusteeship. *Upon the imposition of any suspension under this section, the Department Commander shall establish a trusteeship as prescribed in Section 211 of the Manual of Procedure.*

Actions by the Commander-in-Chief – Revocation. *The Commander-in-Chief may revoke a Post Charter.*

Actions by the Department Commander – Suspension. *The Department Commander may suspend a Post Charter for a period of up to three (3) months.*

Sec. 212 – Defunct Posts.

The Commander-in-Chief shall revoke a Post's Charter if such Post has less than ten (10) members on February 1.

In the event of such a revocation, disposition of the property and trust funds of the Post shall be handled as prescribed in Section 210.

Sec. 213 – Arrearages, Deficiencies and Omissions.

Any Post in arrears for any financial obligations to County Council (if applicable), District, Department and National for fees, dues, poppy money, supply money, failing to

* * *

***VETERANS OF FOREIGN WARS
OF THE UNITED STATES***

May 18, 2009

RESCINDED RESCINDED RESCINDED

TO: Interested Departments

**From: Kevin C. Jones, Director
 Administrative Operations**

SPECIAL ORDER NO. 392

Upon the recommendation of the Commander, Department of California, that portion of Special Order No. 197, dated May 7, 2007 announcing the cancellation of Barstow Home Post No. 385, is hereby rescinded and the Post restored to good working order.

**By order of
Glen M. Gardner, Jr.
Commander-in-Chief**

OFFICIAL:

**/s/ Allen "Gunner" Kent
Allen "Gunner" Kent
Adjutant General**

Distribution:

**Post Commander (Through Channels)
Department Headquarters
Ladies Auxiliary
National Veterans Service
Adjutant General
Quartermaster General
File**

[Address And Phone Numbers Omitted In Printing]
