

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   KEN L. SALAZAR, SECRETARY                                 :

4   OF THE INTERIOR, ET AL.,                                     :

5                                 Petitioners                                 :

6                                 v.   :   No. 08-472

7   FRANK BUONO.   :

8   - - - - - x

9   Washington, D.C.

10   Wednesday, October 7, 2009

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12                                 The above-entitled matter came on for oral  
13   argument before the Supreme Court of the United States  
14   at 10:04 a.m.

15   APPEARANCES:

16   GEN. ELENA KAGAN, ESQ., Solicitor General, Department of  
17   Justice, Washington, D.C.; on behalf of the  
18   Petitioners.

19   PETER J. ELIASBERG, ESQ., Los Angeles, Cal.; on behalf  
20   of the Respondent.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument first today in Case 08-472, Salazar v. Buono.  
5 General Kagan.

6 ORAL ARGUMENT OF GEN. ELENA KAGAN

7 ON BEHALF OF THE PETITIONERS

8 GENERAL KAGAN: Mr. Chief Justice, and may  
9 it please the Court:

10 The Establishment Clause does not prohibit  
11 the sensible action Congress took in enacting Section  
12 8121 and thereby divesting the Federal Government of the  
13 property at issue in this case.

14 The district court gave Congress two basic  
15 options when it found the Sunrise Rock War Memorial  
16 unconstitutional. First, Congress could accede to  
17 permanently removing the memorial, ending the dispute,  
18 but also doing away with a memorial that for 75 years  
19 had commemorated America's fallen soldiers and had  
20 acquired deep meaning for the veterans in the community.

21 Or, second, Congress --

22 JUSTICE GINSBURG: General Kagan, just as a  
23 factual matter, is there any other national memorial  
24 that consists of a solitary cross, just that one symbol  
25 and no other?

1                   GENERAL KAGAN: I don't believe that there  
2 is, Justice Ginsburg. There are national memorials that  
3 have some religious content to them. There is, for  
4 example, a statue of a Catholic priest holding a very  
5 large cross, but most national memorials are -- are not  
6 religious. Some are.

7                   The -- the -- you know, I think that it  
8 would even be possible, for example, to make a church or  
9 a synagogue a national memorial. If -- if Dr. King's  
10 church were selected as a national memorial because of  
11 -- in order to honor Dr. King, I think that would be  
12 permissible. If --

13                  JUSTICE GINSBURG: Well, I was just curious  
14 as a factual matter whether this lone cross, if -- if  
15 there was any other memorial like that, and your answer  
16 is no, but there could be other religiously oriented  
17 memorials?

18                  GENERAL KAGAN: Yes, and there is at least  
19 one religiously oriented memorial that I know of, which  
20 is a priest holding a cross.

21                  JUSTICE ALITO: What are the practical  
22 consequences of something being designated as a national  
23 memorial?

24                  GENERAL KAGAN: Very little, Justice Alito.  
25 In fact, it has no consequences in terms of the

1 government's supervision of the land. National  
2 memorials can be on private land or on public land. If  
3 they are on private land, nothing goes along with the  
4 designation by way of more extensive regulation or  
5 supervision by the National Park Service.

6 JUSTICE GINSBURG: Is the -- is the private  
7 property owner who has this designation free to destroy  
8 it after it's been designated a national memorial?

9 GENERAL KAGAN: Yes, Justice Ginsburg. The  
10 Veterans of Foreign Wars here could in fact take down  
11 this memorial once it is transferred to them, if the  
12 Court allows that transfer.

13 JUSTICE GINSBURG: Could they then  
14 substitute whatever other memorial they chose?

15 GENERAL KAGAN: The --

16 JUSTICE GINSBURG: Or would there have to be  
17 some government approval?

18 GENERAL KAGAN: No, no, no. The  
19 reversionary clause which is at issue, which is a part  
20 of the transfer legislation, says that the VFW will have  
21 to put up a veterans memorial, but the content of that  
22 veterans memorial is entirely up to the VFW.

23 JUSTICE GINSBURG: But it wouldn't  
24 automatically require acquire a national memorial  
25 status, would it, when the government hasn't seen it,

1 hasn't -- I thought that to get national memorial  
2 status, the government has to approve what you put up.

3 GENERAL KAGAN: Yes, that's correct. If the  
4 VFW took down this memorial and substituted a different  
5 memorial, that memorial would not at that point have  
6 national memorial status.

7 There is a little bit of a dispute as to  
8 whether the -- the VFW could in fact take down the  
9 memorial or whether it's designation as a national  
10 memorial would prevent them from doing that. I think  
11 it's quite clear, if you look at the statute, that the  
12 Section 1369, which is what the Respondents point to,  
13 would not prevent the VFW from taking down this  
14 memorial, if it so wanted to, because 1369 applies only  
15 to national memorials which are on public property. If  
16 the transfer were to take place, of course, it would not  
17 be on public property, or it would not be under the  
18 supervision, in any way, of the Federal Government.  
19 So --

20 JUSTICE SCALIA: General Kagan, before you  
21 go -- go on with your argument, you presented it as --  
22 as though the issue before us is the -- the conveying of  
23 the land. But is it?

24 What this was was simply an affirmation of  
25 the prior injunction. The court of appeals said the

1 prior injunction had not been mooted by the -- by the  
2 transfer of the land. So isn't really the issue whether  
3 that -- that prior injunction, when the land did indeed  
4 belong to the government, whether that prior injunction  
5 was valid?

6 GENERAL KAGAN: Well, there is a question in  
7 this case whether the prior injunction was valid and was  
8 the display itself a violation of the Establishment  
9 Clause.

10 JUSTICE SCALIA: Right.

11 GENERAL KAGAN: But the government argued  
12 below that that question had been mooted out because of  
13 the passage of the transfer legislation.

14 JUSTICE SCALIA: But didn't the court of  
15 appeals say no?

16 GENERAL KAGAN: The court of appeals did say  
17 no, but it remands the government --

18 JUSTICE SCALIA: So -- so what we have  
19 before us is the court of appeals' affirmation of the  
20 prior injunction, which applied to a cross on public  
21 land.

22 GENERAL KAGAN: Well, I think what you have  
23 before you, there were of course two stages in this  
24 litigation, and the first stage declared the display  
25 unconstitutional, and then the second stage declared the

1 transfer as well unconstitutional or at least a  
2 violation of the prior injunction.

3 JUSTICE SCALIA: Of course, if I -- if I  
4 thought the display wasn't unconstitutional, the  
5 transfer would a fortiori not --

6 GENERAL KAGAN: Well, that is correct. We  
7 do think that the issue before the Court now is the  
8 congressional legislation which has been passed, which  
9 is the transfer legislation, that that has essentially  
10 changed the situation on the ground, so that no longer  
11 is the question whether the display from the -- whether  
12 the display by the government would be constitutional,  
13 but only whether the government has the ability to  
14 transfer this property and -- and to give up all  
15 supervision, all control over it.

16 So that the message --

17 JUSTICE BREYER: I don't see why that's the  
18 issue before us. Look, procedurally this is a little  
19 boring, but it seems pretty well established in the law.  
20 I read a case called Toledo Scale and then there are a  
21 bunch of cases on jurisdiction, which I'm not going to  
22 name them because I'm sure you looked at them, but  
23 Travelers Indemnity, et cetera. And it seems to me they  
24 make absolutely clear that once a litigant, you and the  
25 others, have had an opportunity to raise a matter and



1 now the case is over, done, but for an injunction that  
2 stays in, all those issues that they previously raised  
3 or could have raised are gone; that the only question  
4 left is whether the government has complied with the  
5 injunction.

6               So I read the injunction. The injunction  
7 says the government is enjoined from permitting the  
8 display of the Latin cross, period. Once this law takes  
9 effect and you follow it, you are violating that  
10 injunction. You don't need nine proceedings to see  
11 that. You are violating it.

12              Now, if you don't like the injunction  
13 because you think the statute has so changed the  
14 circumstances there is no need for it, there is a  
15 remedy. You go back to the district court and you say:  
16 Judge, change the injunction. But you haven't done  
17 that. And therefore, the only question before us is  
18 whether the Ninth Circuit is right in saying when you  
19 carry the statute into effect, you are violating this  
20 injunction, which I think no one could say you aren't.

21              Now, now, that -- that's a very technical  
22 boring issue. I don't know why we heard this issue, but  
23 I don't see how we could reach any other issue in this  
24 case.

25              GENERAL KAGAN: Justice Breyer, I think we

1 are in perfect compliance with the injunction and have  
2 been since the day it was issued. Now, in fact there  
3 were two injunctions issued. As I said, there were two  
4 stages of this litigation. The first stage ended in an  
5 injunction that said do not display the war memorial.  
6 In compliance with that injunction, the next day the war  
7 memorial was covered. So we were in compliance from  
8 the -- from the moment that the decision issued.

9               Now then, Respondents went back to the  
10 district court and asked for additional relief, because  
11 what -- during the first court of appeals hearing,  
12 Congress had passed this transfer statute. And so the  
13 Respondents went back and said: In addition to the  
14 injunction that you previously gave us, we essentially  
15 need a new injunction and that injunction will be to  
16 stop the transfer.

17               JUSTICE BREYER: But that's not what I'm  
18 talking about.

19               JUSTICE GINSBURG: I thought the Respondents  
20 asked to have the injunction enforced. It is typical,  
21 you get an injunction -- and I'm glad that the  
22 government has recognized that that was indeed a final  
23 decision because you appealed it to the Ninth Circuit  
24 under 1291 as a final decision. Then the question is,  
25 are you complying with the injunction. One side says,

1 the winner -- who by the way has unquestioned standing  
2 to enforce the injunction that is now final that that  
3 party obtained -- the winner says: Court, please  
4 enforce the injunction. They are not asking for a new  
5 injunction. They say this injunction, as Justice Breyer  
6 just explained, says, do not permit the cross. The  
7 party comes in and says: Here's my injunction; court,  
8 all I want you to do is enforce it.

9 GENERAL KAGAN: Justice Ginsburg, this is  
10 much more than an enforcement action.

11 JUSTICE BREYER: We are talking about the  
12 first. We are talking about the first injunction. The  
13 first injunction says that the government may not permit  
14 display. You've covered it up, so you are not  
15 permitting display. You are in compliance.

16 GENERAL KAGAN: That is correct.

17 JUSTICE BREYER: But what the plaintiff here  
18 said is that when you comply with this statute, you will  
19 not be in compliance, because you will turn it over to  
20 the VFW that will uncover it, so you will have permitted  
21 it to be displayed. Now, that I can see is an issue  
22 before us. But I don't see any other issue before us.

23 GENERAL KAGAN: Justice Breyer, again, the  
24 Respondents had to go back to the district court in  
25 order not just to enforce the injunction, which said

1    don't display the statue, but to get additional relief,  
2    which was don't transfer the statue.  If the transfer  
3    had taken place, it would no longer have been the  
4    government's property, the government would not have  
5    permitted or not permitted the display because it wasn't  
6    the government's property to permit or not to permit the  
7    display.

8                    JUSTICE SCALIA:  It seems to me unreasonable  
9    to read the injunction to say the government shall not  
10  permit anybody to display a cross on that land no matter  
11  who owns the land.  I assume the injunctions meant you  
12  will not permit the cross to be displayed on this parcel  
13  of government land.

14                   GENERAL KAGAN:  And the Ninth Circuit  
15  specifically said -- when this came to the Ninth  
16  Circuit, the Ninth Circuit was asked by the Respondents.  
17  In order to rule on the transfer legislation, the Ninth  
18  Circuit specifically said:  We are not going to do that;  
19  that's a decision for another day, a separate decision.  
20  Because of that, the Respondents had to go back to the  
21  district court and had to get the district court  
22  essentially to modify the injunction and to provided  
23  additional relief.

24                   Now, there is some question as to whether  
25  the standing question here, just the standing question

1 is precluded, and our view is that it is not preclude,  
2 because the way the government views this is it's one  
3 entire litigation in which all issues are open.

4 JUSTICE GINSBURG: Do you know, General  
5 Kagan, any case in which there has been a permanent  
6 injunction ordered, final, no more appeals are possible,  
7 where -- and standing was in question, raised,  
8 litigated, and decided, and then when the party who won  
9 the injunction comes to the court and says, court,  
10 please enforce the injunction, that you can say, now we  
11 can go back to square one and argue again about  
12 standing? I don't see how you can revive what has been  
13 determined by a final judgment.

14 GENERAL KAGAN: Well, either this is one  
15 litigation, in which all cases are before the Court, or  
16 it's too entirely separate litigations, in which case  
17 the Court has an obligation to independently consider  
18 the standing question.

19 JUSTICE GINSBURG: Well, we know it isn't  
20 that because, as I think you pointed out, the same  
21 docket number. This wasn't a new complaint. This was a  
22 motion to enforce the judgment.

23 GENERAL KAGAN: It couldn't have been a  
24 motion to enforce the judgment because the government  
25 was in compliance with the judgment and because the

1 Ninth Circuit had said that the question that  
2 respondents were raising was an entirely separate issue  
3 for another day, according to the Ninth Circuit.

4 CHIEF JUSTICE ROBERTS: I would suppose -- I  
5 guess I don't agree with your dichotomy, either it's the  
6 same action or it's entirely separate. I would suppose  
7 it could be some issues carry over and are the same, and  
8 perhaps standing is one of those. Other issues are  
9 completely new, such as the effect of the legislation,  
10 which couldn't have been before the district court since  
11 it hadn't been passed.

12 But standing is different. I mean, once  
13 it's been determined that there is standing and that is  
14 reflected in a final judgment, then I think the later  
15 aspects are simply whether the person -- once it's  
16 embodied in a judgment, I think that is the basis for  
17 standing and not the earlier questions of whether he  
18 visited it enough or planned to visit enough.

19 GENERAL KAGAN: Mr. Chief Justice, we could  
20 not have taken the standing question to this Court in  
21 the -- in the procedural posture that the case was at at  
22 that point. It would have been really an irresponsible  
23 action on our part to ask this Court to address the  
24 standing issue after the first court of appeals judgment  
25 where -- where we knew that we were going to relitigate

1 the question of the validity of the transfer. We  
2 couldn't have come to you, we wouldn't have come to you,  
3 as the Solicitor General's Office and asked you to  
4 adjudicate a decision that was as likely as not going to  
5 be irrelevant.

6 JUSTICE SOTOMAYOR: I don't understand -- I  
7 don't understand that point at all. If you thought that  
8 he didn't have standing to challenge the cross at all  
9 and that the injunction itself directing you to cover up  
10 the cross was wrong, you should have come to the Court.  
11 It was a permanent injunction. You were told you have  
12 interlocutory appeal rights, you have final judgment  
13 rights. At any point you could have come and said: The  
14 order for us to take that flag -- to take that cross off  
15 this land was just plain wrong.

16 GENERAL KAGAN: I think, Justice Sotomayor,  
17 you are right that we could have, but I don't think that  
18 we would have used our discretion, in a sense knocking  
19 on this Court's door, the Solicitor General's Office  
20 discretion, in order to ask you to decide a question  
21 that was as likely or not going to be completely  
22 irrelevant depending on what happened with respect to  
23 the transfer statute.

24 JUSTICE SOTOMAYOR: But interlocutory appeal  
25 or finality doesn't matter what you are going to do to

1 get away from the injunction. The issue is did you give  
2 up any rights to challenge any of the issues embodied in  
3 that injunction and you haven't answered why not. You  
4 may have a right, and you do, to challenge a  
5 modification of that injunction. That's what you are  
6 here to do, to say the Ninth Circuit erred in modifying  
7 the injunction and stopping the transfer. Perfectly  
8 legitimate point, because the injunction has been  
9 changed. But you can't go back and relitigate whether  
10 he had standing to challenge that -- the presence of  
11 that cross.

12 GENERAL KAGAN: Well, Justice Sotomayor, I  
13 appreciate the distinction that you are making between  
14 the standing question and the merits question and I  
15 think you are exactly right as to that point. But  
16 whatever the question as to whether we have given up the  
17 standing question, certainly there is no such question  
18 on the merits of this -- of the validity of this  
19 transfer. But with respect, I think that the standing  
20 question is -- is not the way you described it. And  
21 it's partly because we couldn't have come to this Court  
22 or we wouldn't have come, is a better way to say it. We  
23 would have thought that it was not the right kind of  
24 position to ask the Court to take certiorari on a  
25 question that basically was very likely, we thought, was



1 very likely to go away.

2 JUSTICE KENNEDY: Well, but that -- that's  
3 because -- that's because you assume the act is going to  
4 be valid. You could have come here and said: This is  
5 such an important case Congress is taking action, and  
6 therefore, you should hear our standing argument to  
7 avoid the necessity of the Legislative Branch having to  
8 come in. You could have said that.

9 GENERAL KAGAN: Well, but we didn't, because  
10 we did think that Congress had acted appropriately and  
11 that the congressional act was valid, and continue to do  
12 so, continue to think that this --

13 JUSTICE GINSBURG: Yes, but the standing  
14 issue was independently important to the government,  
15 because the government can face this kind of question  
16 again, and if you right -- if you were right on the  
17 standing point -- I mean, I don't understand why the  
18 government would not have had a strong incentive to say,  
19 we want to get rid of these cases on the standing  
20 ground, we think the Court was wrong on standing.

21 But in any case, you didn't do that, and I  
22 think that you started your argument this morning in the  
23 right place when you said, let's talk about this law.  
24 Congress said, accepting arguendo that the Court was  
25 right, here's a law that cures the constitutional

1 defect. And that's where you were -- that's where you  
2 started your argument. Maybe you can pick up with that.  
3 But --

4 JUSTICE BREYER: But just I want to just get  
5 this clear procedurally. I'm sorry. It'll take one  
6 more second.

7 As I read this, there is no modification of  
8 any injunction. What the -- what the Respondent asked  
9 for, he said: Judge, either hold that the transfer  
10 violates the current injunction, or modify the  
11 injunction. Then what the district court did do is he  
12 said the proposed transfer violates the permanent  
13 injunction. The permanent injunction is in the, like,  
14 the third paragraph of the July 24th order, and it says,  
15 you are permanently enjoined from permitting the display  
16 of the Latin cross. Therefore, he rejected the need to  
17 modify it, and held that --

18 GENERAL KAGAN: Justice Breyer.

19 JUSTICE BREYER: -- this violates the  
20 injunction as written, and the Ninth Circuit affirmed  
21 that.

22 So is there any question in this case of  
23 modifying? Is there any question other than the one  
24 that I think Justice Scalia was taking a good argument  
25 about, whether the proposed statute violates the

1 July 24th injunction? That's what the case is about.

2 Or why am I wrong?

3 GENERAL KAGAN: You -- you are incorrect,  
4 Justice Breyer, because in addition to saying this  
5 violates the previously given injunction, the district  
6 court said, you are enjoined from transferring this  
7 property in accordance with this statute. And so there  
8 was additional relief, additional relief that the Ninth  
9 Circuit said was additional relief that it wasn't  
10 deciding in the first go-round, and that's -- and that  
11 places the question, the merits question of the validity  
12 of this transfer, directly before the Court.

13 JUSTICE BREYER: Thank you.

14 CHIEF JUSTICE ROBERTS: Before we get --  
15 before your time expires, we would like to spend a  
16 couple of minutes on the merits.

17 (Laughter.)

18 CHIEF JUSTICE ROBERTS: And I wonder if you  
19 could focus on a particular question. What if the  
20 government sold simply one square foot, or whatever the  
21 area that the base of the cross is -- is resting on the  
22 ground? Would your argument be the same?

23 GENERAL KAGAN: Mr. Chief Justice, there are  
24 certainly limits to the way that the government can  
25 transfer property, and I would give you a few of them.

1 If -- if it was not a bona fide sale, so that there  
2 wasn't proper consideration; if -- if there was only  
3 religious purpose, so that there was no secular purpose  
4 involved; or if after the sale the property was  
5 indistinguishable from government property, so that  
6 everybody naturally thought that this was government  
7 property. In those cases --

8 CHIEF JUSTICE ROBERTS: Well, why isn't that  
9 -- why isn't that the case here?

10 GENERAL KAGAN: In fact, it's not the case  
11 here. And it's not the case for two reasons. First,  
12 the preserve is riddled with private inholdings. There  
13 are 1800 private landowners with -- excuse me, 1,000  
14 private landowners with 1800 plots of land.

15 JUSTICE STEVENS: But what percentage of the  
16 total area do they represent?

17 GENERAL KAGAN: I'm sorry?

18 JUSTICE STEVENS: What percentage of the  
19 total area do they represent?

20 GENERAL KAGAN: It's about -- between the  
21 State and the private inholdings, it's about 10 percent  
22 of the total area. But they are dotted all over the  
23 place. So tomorrow, 1,000 crosses could go up and  
24 nobody would know whether they were on private land or  
25 on public land. Moreover --

1 JUSTICE STEVENS: But do you concede there  
2 was a violation at the time the case was decided?

3 GENERAL KAGAN: I'm sorry?

4 JUSTICE STEVENS: Do you concede that the  
5 Establishment Clause was violated at the time this case  
6 was decided?

7 GENERAL KAGAN: We do not, Justice Stevens.  
8 The government has argued -- argued below that there was  
9 no violation prior to the transfer statute, and that  
10 remains the government's position, although, as I said  
11 to Justice Scalia, we think that that position has been  
12 overtaken by events and that the only question before  
13 the Court is the transfer statute.

14 I was going to go on to say to the Chief  
15 Justice that, in addition to the fact that private  
16 inholdings just riddle the preserve, the government is  
17 perfectly happy to put up signs which make clear that  
18 the -- the plot in question will not in fact be the  
19 government's, but will be the VFW's.

20 CHIEF JUSTICE ROBERTS: Well, isn't that an  
21 interference or it's singling out someone, private  
22 property owner, who's using his property in a particular  
23 way, a religious way? You are going to be putting up  
24 signs only for people putting up religious symbols.

25 GENERAL KAGAN: I don't think that that is

1 correct, Mr. Chief Justice. I think that the preserve  
2 would put up signs for various historic or cultural or  
3 otherwise important --

4 CHIEF JUSTICE ROBERTS: But it hasn't done  
5 anything like that. It doesn't say for other property  
6 owners that have maybe something that -- you know, a  
7 ramshackle shack, that they want people to know this  
8 isn't the government's property. They don't do anything  
9 like that.

10 It's -- under your hypothetical, it would be  
11 only religious property that would have these special  
12 warning signs.

13 GENERAL KAGAN: Well, I suspect that there  
14 are a great many identification signs throughout the  
15 preserve, although I don't know precisely what they are.  
16 And this would be one of those, saying essentially that  
17 there is this war memorial, that it was put up by the  
18 VFW, that it is maintained and owned by the VFW.

19 JUSTICE GINSBURG: Who would see it, General  
20 Kagan? Who would see it? I mean, the Seventh Circuit  
21 case, it was -- it was on level ground, lots of people  
22 used the area, and I think the Seventh Circuit required  
23 a fence and a sign. But here, this cross is high on a  
24 cliff in a desolate area. And if you had a little sign,  
25 who would be -- you would have to climb up to it.

1                   GENERAL KAGAN: I actually think, Justice  
2   Ginsburg, that it would be easy to do. I was out there  
3   three or four weeks ago. The superintendent drove me to  
4   the site. There is virtually nobody who could see this  
5   war memorial in any other way than by going in one of  
6   two directions on Cima Road. And you could put signs up  
7   on Cima Road that said exactly what you were going to  
8   see, you know, in 100 yards or a mile or whatever it  
9   was.

10                  CHIEF JUSTICE ROBERTS: How is the question  
11   of -- I don't want to get into your rebuttal time, but  
12   briefly, how is the question of whether signs are or  
13   aren't valid or required before us in this case? There  
14   are no signs there, and you are asking us to consider  
15   whether the statute is valid or not.

16                  GENERAL KAGAN: I think, Mr. Chief Justice,  
17   that if we were not going to put up signs, it would  
18   still be valid. So I should make that completely clear.

19                  And as I said, there are many, many private  
20   holdings within the preserve, people who could put up  
21   whatever religious symbols they wanted to. One simply  
22   wouldn't know whether it was on private land or on other  
23   land. But I will say, in addition to that, that the  
24   preserve's superintendent himself would like to put up a  
25   sign essentially telling preserve users what the war

1 memorial was and what its provenance was. If some --

2 JUSTICE SOTOMAYOR: Isn't there legislation  
3 that requires the original plaque to be reinstated, the  
4 plaque recognizing the donation and what it means?

5 GENERAL KAGAN: That's correct, Justice  
6 Sotomayor. But I have to say that that's more of the  
7 kind of sign that maybe Justice Ginsburg had in mind,  
8 which is, it's smaller and you would have to go right up  
9 to the war memorial in order to see it.

10 I think it would be very easy to put up  
11 signs just on the road to make clear that anybody who  
12 was in the area would know that this was land --

13 JUSTICE SOTOMAYOR: This would be on  
14 government land, that sign? It wouldn't be on the acre  
15 that you transferred. I'm a little confused.

16 GENERAL KAGAN: The small plaque.

17 JUSTICE SOTOMAYOR: You are talking about  
18 putting --

19 GENERAL KAGAN: The small plaque --

20 JUSTICE SOTOMAYOR: Would go on the cross?

21 GENERAL KAGAN: That's correct.

22 JUSTICE SOTOMAYOR: The larger sign you're  
23 talking about that you are willing to do is a sign that  
24 you would put on government land.

25 GENERAL KAGAN: That's correct. And as I



1 said, it's something that the superintendent would like  
2 to do and I think would be consistent with signage in  
3 the area. If I --

4 JUSTICE SOTOMAYOR: Did you raise that  
5 alternative with the Ninth -- with the district court  
6 and the Ninth Circuit?

7 GENERAL KAGAN: I don't believe it ever came  
8 up, Justice Sotomayor. We did talk about it in our  
9 merits brief to this Court, but I don't think that it  
10 ever came up below.

11 If I could reserve the balance of my time,  
12 Mr. Chief Justice.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
14 Mr. Eliasberg.

15 ORAL ARGUMENT OF PETER J. ELIASBERG

16 ON BEHALF OF THE RESPONDENT

17 MR. ELIASBERG: Mr. Chief Justice, and may  
18 it please the Court:

19 Justice Breyer, I would like to direct my  
20 beginning remarks to you. I believe you've correctly  
21 stated the procedural posture exactly right. The only  
22 question, point that I would make, is that I don't  
23 believe we did -- there was a modification of the  
24 injunction here. Any time a defendant passes a piece of  
25 legislation after an injunction is first entered, there

1 may be a question as to whether that new statute or  
2 legislation is consistent with the injunction. But it's  
3 not new relief.

4 JUSTICE BREYER: I see what the judge did.  
5 He said: The motion to enforce the July 24th injunction  
6 is granted. He said: Buono's motion to amend it is  
7 denied. Then he did two other things, which he listed  
8 some people and he said they are enjoined from  
9 implementing the law.

10 Now, I take it that those paragraphs 3 and 4  
11 are an implementation of the July 24 injunction which he  
12 granted, not a new injunction.

13 MR. ELIASBERG: That's exactly correct.

14 JUSTICE BREYER: So that's the issue here  
15 that we were just possibly debating. The issue in the  
16 case is whether the district judge might lawfully  
17 enforce an old injunction in the manner he did, which  
18 was to add paragraphs 3 and 4. That question you  
19 concede is here.

20 MR. ELIASBERG: I believe that's -- that is  
21 here and that is really the only question that is here.

22 CHIEF JUSTICE ROBERTS: So that under your  
23 approach that this is looking to see if the injunction  
24 is being enforced or violated, we would be reviewing an  
25 act of Congress under an abuse of discretion standard,

1 not -- not de novo?

2 MR. ELIASBERG: That's correct. But for  
3 this --

4 CHIEF JUSTICE ROBERTS: Have we ever done  
5 that before?

6 MR. ELIASBERG: I --

7 CHIEF JUSTICE ROBERTS: Have we ever said  
8 that an act of Congress is unconstitutional without a  
9 de novo review of the merits of the constitutionality?

10 MR. ELIASBERG: I am not aware of that, but  
11 I am also not aware of a situation where the act of  
12 Congress is being put forth as the response to an  
13 already adjudicated constitutional violation.

14 JUSTICE GINSBURG: Mr. Eliasberg, I thought  
15 that the Ninth Circuit the first time around had taken  
16 meticulous care to make certain that the issue of the  
17 validity of the statute would not be before the Court in  
18 the first round. Judge Kozinski wrote: "We express no  
19 view as to whether a transfer completed under Section  
20 8121 would pass constitutional muster, but leave this  
21 question for another day."

22 That's on page 104a of the petition.

23 And then the district judge said: Yes, I  
24 recognize the Ninth Circuit didn't touch the validity of  
25 that statute, left it for another day. The day has

1    come.  So it is for the first time that the Court is  
2    deciding the question of whether section 8121 passes  
3    constitutional muster.

4                   MR. ELIASBERG:  The only thing I would  
5    disagree with you on that point, Justice Ginsburg, is  
6    that the question is whether the act of Congress  
7    remedies the already adjudicated constitutional  
8    violation and is consistent with the injunction.

9                   CHIEF JUSTICE ROBERTS:  So when you get to  
10   the consistent with the injunction part -- I thought it  
11   was your position that we should review this question  
12   solely under an abuse of discretion standard?

13                  MR. ELIASBERG:  It is our position --

14                  CHIEF JUSTICE ROBERTS:  Because while the  
15   Court did not decide the validity of the act in the  
16   first case, it certainly did in the second case, which  
17   is why we have the case before us.

18                  MR. ELIASBERG:  That is correct.  We  
19   believe -- but may I make two points, Mr. Chief Justice?

20                  First, we believe in the enforcement context  
21   where the question is, is this a violation of an already  
22   entered injunction that was part of a final judgment,  
23   that that is traditional equity principles that you  
24   review for an abuse of discretion.  Nonetheless, we  
25   believe that we win even under a de novo standard.

1 So -- and if I could set forth some of the reasons for  
2 that.

3 I think, Justice Breyer, that you have it  
4 exactly correct, that what the government has done here  
5 by selecting a particular transferee who has been given  
6 preferential access to the land in the past to the  
7 exclusion of others who wanted to erect other symbols,  
8 that the government is taking affirmative steps to  
9 permit, through this transfer statute, the display of  
10 the cross that they are enjoined from doing.

11 Now, Justice Scalia, I believe your point is  
12 at some point if this is on private land and the  
13 government is not making any efforts to further this  
14 display, that it couldn't possibly be that the  
15 injunction forbids that. And that may well be correct,  
16 but that is not the case we have in front of it.

17 The government in this transfer statute has  
18 made a significant number of affirmative steps to ensure  
19 that the cross remains up. It has selected --

20 JUSTICE ALITO: When this injunction was  
21 first entered the statute -- nobody contemplated that  
22 this statute was going to be enacted; isn't that  
23 correct?

24 MR. ELIASBERG: When the district court  
25 entered the injunction, that is correct.

1 JUSTICE ALITO: Yes. So isn't the sensible  
2 interpretation of the injunction that it was prohibiting  
3 the government from permitting the display of the cross  
4 on government property, and not on private property that  
5 happens to be within the Mojave National Preserve?

6 MR. ELIASBERG: I don't believe so, Justice  
7 Scalia -- excuse me -- Justice Alito, for a couple of  
8 reasons. One of the bases for the entry of the  
9 injunction in the first instance was the way that the  
10 government had favored one party to come on, contrary to  
11 the government's own regulations, and erect a permanent  
12 symbol, while not allowing others.

13 JUSTICE ALITO: Wasn't your argument that  
14 this was a violation of the Establishment Clause because  
15 it was on government land? Did you make the argument  
16 that even if this was on one of the ranches within the  
17 Mojave National Preserve, it would still be a violation  
18 of the Establishment Clause?

19 MR. ELIASBERG: We did not make that  
20 argument because it wasn't presented to the Court.

21 JUSTICE ALITO: Yes, it was a totally -- so  
22 the situation completely changed and the district court  
23 either modified the injunction -- it seems to me  
24 modified the injunction by interpreting it to mean  
25 something quite different from what anybody contemplated

1 it meant when it was originally entered?

2 MR. ELIASBERG: Well, I think that, as is  
3 traditional equity principles, the district court is at  
4 some level the master of its injunction and that's why  
5 we give an abuse of discretion standard. The district  
6 court very clearly said: I see this as an attempt by  
7 the government not to abide by my injunction; they are  
8 favoring the same parties they favored when -- that was  
9 part of the --

10 JUSTICE SCALIA: Well, of course, it was  
11 that, but the question is whether it was a permissible  
12 amendment by the government of the situation. Of  
13 course, I will stipulate that the government was trying  
14 to arrange it so that the cross could remain there. But  
15 that doesn't mean that it was -- it was evading the  
16 injunction. I mean, that's --

17 MR. ELIASBERG: Well, I think it is --

18 JUSTICE SCALIA: Unless the injunction  
19 clearly applied to the erection of a cross on private  
20 land that the government had -- had transferred.

21 MR. ELIASBERG: Well, but it's not the  
22 erection of the cross. It is the transfer of something  
23 where the government has a reversionary interest. It  
24 very much directs the way the VFW is likely to use the  
25 land. It selected a particular transferee who has been

1 favored from the beginning. They didn't say: We're  
2 going to neutrally sell the land in order to allow this  
3 constitutional violation to be --

4 JUSTICE SCALIA: I will -- I will concede  
5 that the obvious purpose of that was to avoid being in  
6 violation of the injunction. But that doesn't mean that  
7 it's invalid.

8 MR. ELIASBERG: Well, I believe it's invalid  
9 because I think that the affirmative steps they are  
10 taking here really make them -- put them in a position  
11 where they are permitting --

12 JUSTICE SOTOMAYOR: Can -- can -- what,  
13 what -- let's start from the beginning. Can -- would it  
14 be proper for the government or would the government be  
15 alleged to have violated the Establishment Clause if on  
16 another ranch that cross -- a cross went up?

17 MR. ELIASBERG: No, they would not.

18 JUSTICE SOTOMAYOR: All right. So really  
19 your argument is that the reason this Court -- this  
20 cross on private land, if it becomes private, is  
21 offensive to the Establishment Clause is because of the  
22 government's prior history with respect to that cross,  
23 correct? That's -- that's your argument?

24 MR. ELIASBERG: That is one part of my  
25 argument. But there is another part. The government



1 has taken the step of designating this cross one of 49  
2 national memorials in the whole country and the only  
3 national memorial commemorating American service in  
4 World War I, even though it's clear in the record --

5 JUSTICE SOTOMAYOR: So are you alleging that  
6 doing that violates the Establishment Clause, passing or  
7 designating a religious symbol as a national memorial,  
8 that that violates the Establishment Clause?

9 MR. ELIASBERG: We are alleging that under  
10 the totality of the circumstances, which includes the  
11 national memorial designation, the government's asserted  
12 purpose to make sure that the cross remains up, the  
13 government's favoritism of the same parties that it has  
14 always favored in this case to the exclusion of others,  
15 and the maintaining of the property interest in the land  
16 in the form of a reversionary interest, all of those  
17 things --

18 JUSTICE SOTOMAYOR: Does that apply to all  
19 lands in this preserve?

20 MR. ELIASBERG: I'm sorry, does what apply  
21 to all lands?

22 JUSTICE SOTOMAYOR: Does the reversionary  
23 interest apply to all of lands on this preserve? Maybe  
24 your adversary has to answer that instead of you, but  
25 all of the other private property owners.

1                   MR. ELIASBERG: No, the reversionary  
2 interest specifically says the land reverts to the  
3 government if --

4                   JUSTICE SOTOMAYOR: No, no, no. Are all of  
5 the private owners on this preserve required to give the  
6 land back to the U.S. if they put it to some different  
7 use?

8                   MR. ELIASBERG: I don't believe that that  
9 is true.

10                  CHIEF JUSTICE ROBERTS: Counsel, if -- if --  
11 if the government sold this land to a private party, no  
12 cross in the picture at all, and they go to settlement  
13 and at settlement the private landowner who is going to  
14 buy it says, you know, I'm going to put a big cross up  
15 on this property once I get it, can the government still  
16 sell it to him?

17                  MR. ELIASBERG: Yes, absolutely.

18                  CHIEF JUSTICE ROBERTS: Okay.

19                  MR. ELIASBERG: If the basis for the  
20 government's decision to sell the -- sell the land was a  
21 neutral basis. And that's what we are saying here. If  
22 what the government has done --

23                  CHIEF JUSTICE ROBERTS: So even though  
24 before the sale, even though the government knows there  
25 is going to be a big cross on the land with the same

1 situation you have here in the middle of the preserve  
2 and all, that's perfectly okay?

3 MR. ELIASBERG: No, it's --

4 CHIEF JUSTICE ROBERTS: I thought you said  
5 before the government sold the land if they find out the  
6 new owner is going to put a cross on it there is no  
7 problem.

8 MR. ELIASBERG: The difference between those  
9 two scenarios, Mr. Chief Justice, is one is a remedial  
10 context. The government has been held to violate the  
11 Constitution. They have to, under *Milliken v. Bradley*  
12 and *U.S. v. Virginia*, take all steps necessary to erase  
13 that constitutional violation.

14 The situation in the first hypothetical you  
15 gave me, there has never been an adjudicated  
16 constitutional violation. It's a very different  
17 situation.

18 JUSTICE STEVENS: But isn't it also a very  
19 different case if a condition of the transfer is that  
20 the transferee will preserve a memorial that has been  
21 designated in the statute as a five-foot-tall white  
22 cross.

23 MR. ELIASBERG: I think that is --

24 JUSTICE STEVENS: So it is a condition of  
25 the transfer.

1                   MR. ELIASBERG: As I was stating to Justice  
2 Sotomayor, that is one of the factors that we believe  
3 separates this situation from the kind of hypotheticals  
4 that you're setting forth.

5                   CHIEF JUSTICE ROBERTS: Do you disagree with  
6 what she told us, which is that the private property  
7 owner can tear down the cross at any time?

8                   MR. ELIASBERG: I think that there are very  
9 significant obstacles to their doing that. One, I don't  
10 -- I disagree with the General's -- General Kagan's  
11 description of the criminal statute that prohibits the  
12 defacement of memorials on private land, because one of  
13 the provisions is that we will consider it a situation  
14 that is covered by the statute that the land be under  
15 the jurisdiction of the Federal Government. Well, the  
16 land -- the statute that designated the Mojave Preserve  
17 very clearly says that the land is being transferred  
18 from the jurisdiction of the Bureau of Land Management  
19 to the National Park Service and the Secretary of the  
20 Interior, so it is therefore clearly under the  
21 jurisdiction of the Federal Government. So I think that  
22 there is -- there are possible criminal violations.  
23 There is also a significant question --

24                   CHIEF JUSTICE ROBERTS: You say under the  
25 jurisdiction of the Federal Government. Does that -- do

1 you just mean they have authority to regulate the land?

2 MR. ELIASBERG: That's correct. But that's  
3 the way the statute is written, under Federal  
4 jurisdiction, so I believe that those two terms --

5 CHIEF JUSTICE ROBERTS: Well, I suppose they  
6 have jurisdiction to regulate a lot of -- lot of land  
7 that they don't own.

8 MR. ELIASBERG: Well I think that in this  
9 case when the government is actually -- there's quite a  
10 bit of case law -- we set forth some in our brief --  
11 where they talk about the government's power over land  
12 that's within a national preserve, so I do think that  
13 the criminal statutes may very well apply.

14 It certainly would be a barrier to the VFW's  
15 thinking, well, no risk to us if we tear this cross  
16 down. In addition, the government is required, as I  
17 believe one of the Justices and I don't remember  
18 which -- the government has been required to go back and  
19 put up a plaque that says: This cross erected in honor  
20 of the foreign war dead. It would be very odd indeed, I  
21 believe for the VFW --

22 CHIEF JUSTICE ROBERTS: What else -- what  
23 else does the plaque say.

24 MR. ELIASBERG: The plaque says: "This  
25 cross" -- in big letters -- "erected in honor of the

1 dead of foreign wars." I think it would be very --

2 CHIEF JUSTICE ROBERTS: And that's it?

3 Nothing else?

4 MR. ELIASBERG: Nothing else. I think it  
5 would be very odd indeed for the VFW to feel that it was  
6 free to take down the cross and put up, for example, a  
7 statues of a soldier which would honor all of the people  
8 who fought for America in World War I, not just  
9 Christians, and say: Well, we were free to do that  
10 because even though there's the sign that says, this  
11 cross is designated to honor all the --

12 JUSTICE SCALIA: The cross doesn't honor  
13 non-Christians who fought in the war? Is that -- is  
14 that --

15 MR. ELIASBERG: I believe that's actually  
16 correct.

17 JUSTICE SCALIA: Where does it say that?

18 MR. ELIASBERG: It doesn't say that, but a  
19 cross is the predominant symbol of Christianity and it  
20 signifies that Jesus is the son of God and died to  
21 redeem mankind for our sins, and I believe that's why  
22 the Jewish war veterans --

23 JUSTICE SCALIA: It's erected as a war  
24 memorial. I assume it is erected in honor of all of the  
25 war dead. It's the -- the cross is the -- is the most

1 common symbol of -- of -- of the resting place of the  
2 dead, and it doesn't seem to me -- what would you have  
3 them erect? A cross -- some conglomerate of a cross, a  
4 Star of David, and you know, a Moslem half moon and  
5 star?

6 MR. ELIASBERG: Well, Justice Scalia, if I  
7 may go to your first point. The cross is the most  
8 common symbol of the resting place of Christians. I  
9 have been in Jewish cemeteries. There is never a cross  
10 on a tombstone of a Jew.

11 (Laughter.)

12 MR. ELIASBERG: So it is the most common  
13 symbol to honor Christians.

14 JUSTICE SCALIA: I don't think you can leap  
15 from that to the conclusion that the only war dead that  
16 that cross honors are the Christian war dead. I think  
17 that's an outrageous conclusion.

18 MR. ELIASBERG: Well, my -- the point of  
19 my -- point here is to say that there is a reason the  
20 Jewish war veterans came in and said we don't feel  
21 honored by this cross. This cross can't honor us  
22 because it is a religious symbol of another religion.

23 CHIEF JUSTICE ROBERTS: Can I get back to  
24 your plaque question? Am I wrong? I think the  
25 government told us the plaque reads: "The cross erected

1 in memory the dead of all wars, erected 1934 by members  
2 of Veterans of Foreign Wars, Death Valley Post 2884."

3 MR. ELIASBERG: That is correct, Mr. Chief  
4 Justice, and I apologize. I forgot --

5 CHIEF JUSTICE ROBERTS: That's a big  
6 difference. I mean, the whole point is that the plaque  
7 tells you, this is not a government memorial, government  
8 structure. It was put up by members of the Veterans of  
9 Foreign Wars, Death Valley Post 2884.

10 MR. ELIASBERG: Mr. Chief Justice, the  
11 context of your question was would VFW feel constrained  
12 to keep the cross up? And my point was --

13 CHIEF JUSTICE ROBERTS: The context of my  
14 question was what does the plaque say?

15 MR. ELIASBERG: Well -- I -- I apologize for  
16 not giving the full text, that was not my intention to  
17 -- to mislead the Court or to you, Mr. Chief Justice.

18 CHIEF JUSTICE ROBERTS: All right.

19 MR. ELIASBERG: My only point is that in  
20 that scenario, because did I believe we were talking  
21 about, is the VFW free to do this, and I was pointing to  
22 the criminal statute that I said I believe said that  
23 they couldn't -- wouldn't feel free to take this down.  
24 But second of all, that it would be odd indeed for them  
25 to take it down when there is a big plaque that says



1 this cross erected. With all of the --

2 JUSTICE ALITO: When the Solicitor General  
3 represents to us that the VFW will be perfectly free to  
4 modify this memorial in any way it chooses if they  
5 obtain title to this land, do you think that there's any  
6 realistic fear that they will be required to maintain  
7 this cross, even if they wish to -- to change it in some  
8 way?

9 MR. ELIASBERG: Well, I think that there is  
10 a real -- well, but -- but I don't think that the cases  
11 turn on whether a prosecutor says well, I promise you  
12 that we are not going to enforce the statute. I think  
13 we have to look at the words of the statute and the  
14 words of the reversionary interest, and I think they  
15 both create significant doubt as to whether the VFW  
16 would feel free to turn this -- to take it down, in the  
17 same way that in a context where you are talking about  
18 pre-enforcement --

19 JUSTICE ALITO: Well, I thought your  
20 argument was that although there was going to be a  
21 formal transfer of title, as a practical matter, the  
22 government was still involved with the maintenance of  
23 the cross on this land. And when the government says  
24 that that's not the case, I don't know why that doesn't  
25 cure the practical problem.

1                   MR. ELIASBERG: Well, that -- the -- the  
2 question of government -- continued government  
3 involvement with the land, I believe, continues, because  
4 of the reversionary interest and because of the  
5 designation as a national memorial. Whatever the --

6                   JUSTICE GINSBURG: I think -- I think  
7 General Kagan agreed that they -- the Veterans couldn't  
8 substitute some other memorial, if it's going to be a  
9 national monument it has to have the government's  
10 approval. And the only one that has the government's  
11 approval is the cross.

12                  MR. ELIASBERG: That is correct, Justice  
13 Ginsburg. I don't want to speak for General Kagan but  
14 with respect to the question --

15                  JUSTICE ALITO: Well, I -- I thought the  
16 government's position was it had to be maintained as a  
17 national war -- as a war memorial, but not that it had  
18 to be maintained as a cross.

19                  MR. ELIASBERG: That is the government's  
20 position. But Justice Ginsburg, your question is would  
21 something else they put up be a national memorial, and  
22 the answer is no. Only Congress has the power to  
23 designate a national memorial. Congress has chosen to  
24 designate this particular stand-alone Latin cross as a  
25 government -- as a national memorial.

1 JUSTICE GINSBURG: What about the  
2 government's argument that suppose the government took  
3 down the cross, gave it back to the Veterans of Foreign  
4 Wars, sold them the land in exchange for land of equal  
5 value, and then the Veterans said, fine, the cross was  
6 ours to begin with. Now the land is ours, so we just  
7 put it back. If that would be consistent with the  
8 injunction?

9 The government now has nothing to do with  
10 the cross. It's all the Veterans of Foreign Wars, and  
11 it can't be regarded a sham because it was originally  
12 the Veterans of Foreign Wars who put it up, the  
13 government didn't put it up.

14 MR. ELIASBERG: I believe that that --  
15 obviously not the facts presented by our case, Justice  
16 Ginsburg, but that likely would be consistent with the  
17 injunction, that's correct. But it is not the scenario  
18 we have here.

19 JUSTICE GINSBURG: Then we are talking about  
20 something that is rather formal rather than substantial.  
21 If -- if all the government would have to do is say,  
22 Congress, you didn't get it right. You should have just  
23 made the land swap. And then the government would take  
24 down the cross in compliance with the injunction, and  
25 then it goes right back the next day.

1                   MR. ELIASBERG: Well, I think if there -- if  
2     there were -- I think it's not just formalism, Your  
3     Honor, because one, the reversionary -- I am assuming  
4     that in your hypothetical the reversionary interest is  
5     gone. That is continuing government ownership, future  
6     ownership in property, and one of the government's  
7     principal arguments is when we sell to it a private  
8     owner everyone presumes that the private owner is the  
9     speaker.

10                  But when the government maintains a  
11     substantial future property interest, they haven't sold  
12     the land. They've sold part of their interest in the  
13     land. So if you take away the reversionary interest and  
14     you remove the national memorial designation and then  
15     the VFW independently does choose to put up the cross,  
16     it's more than formalism. It is the --

17                  JUSTICE STEVENS: But there is also the  
18     point that I don't think you stressed, that if the  
19     reversionary interest was activated -- say they  
20     abandoned or destroyed it, the property would come back  
21     to the government. And if I read the -- the designation  
22     of the national memorial statute correctly, the  
23     Department of Interior would have to rebuild the old  
24     cross and put it up. There's an affirmative duty to  
25     replace the cross if there is a reversion.

1           MR. ELIASBERG: I believe that that is  
2 correct, Justice Stevens, and that's an important point  
3 that is intertwined with the fact that the reversionary  
4 interest also continues the government's ownership in  
5 the land, when their whole position is, if we privatize  
6 it, as Justice Scalia pointed out, if it's just a  
7 private owner, then we don't associate this cross with  
8 the government. We associate it with the private owner.

9           But the government hasn't done that. It has  
10 maintained an important ownership interest in the land  
11 through that reversionary interest. If there are no  
12 further questions, I will --

13           JUSTICE STEVENS: May I ask this question:  
14 Do you think the issues in this case would be -- stay  
15 the same or different, if this whole scenario occurred  
16 on the Mall in -- right out in front of the  
17 Washington -- the Lincoln Memorial?

18           Would the -- the issues be any different if  
19 it were not an isolated memorial in the desert?

20           MR. ELIASBERG: Context has always mattered  
21 to this Court in Establishment Clause cases.

22           JUSTICE STEVENS: And which way would it  
23 cut, if it is different?

24           MR. ELIASBERG: Well, I do think that  
25 Washington is, certainly, a seat of power, and there is,

1 obviously, a close tie between something that is put on  
2 the National Mall in the seat of government, but I do  
3 think that the designation of a national memorial is  
4 also significant.

5               So, even though this may be an area that is  
6 not nearly as populated as Washington, D.C., it is very  
7 significant that Congress has taken the step with this  
8 particular symbol, one of only 49 in the country,  
9 grouping it with other iconic statues and memorials in  
10 this country and tied it.

11              So I don't think that the distinction,  
12 although it might have some bearing in the Court, in  
13 thinking of the context, I don't think it would change  
14 the result.

15              Justice Kennedy, I want to go back to -- to  
16 one question you had asked earlier about the posture,  
17 and I just want to reiterate. You, very clearly, said,  
18 when the government was saying, well, we didn't have a  
19 good reason to bring this to the Court, and that's why  
20 we didn't, I think your question recognized that the  
21 government had very good reasons.

22              But -- but in addition, it's not really  
23 important, when you have a final judgment, why a party  
24 chooses not to try to take the last step of appeal on a  
25 final judgment, and that's the United States v.

1 Munsingwear case.

2           The government chose not to make that step.  
3 The judgment was final, and there, certainly, is no  
4 basis for this Court to reopen the issues about whether  
5 Mr. Buono had standing in the first instance.

6           JUSTICE ALITO: Well, wasn't -- isn't this  
7 very different from the situation in Toledo  
8 Steel because -- Scale, I'm sorry -- because, if the  
9 merits issue that was before the Ninth Circuit was, if  
10 not technically moot, nearly moot, by the time they  
11 reached it, because of the passage of the new statute.

12           This wasn't -- they said it's not moot  
13 because this is simply the voluntary cessation of  
14 conduct that's been held to be unlawful, but that is  
15 typically applied in the situation where there is a  
16 legitimate fear that the -- the party that has been held  
17 to be violating the Constitution may simply return to  
18 its bad old ways, once the litigation is over.

19           But, here, you have the intervening  
20 enactment of a statute by the Constitution -- by the  
21 Congress of the United States, and I think it would be  
22 quite far-fetched to presume that Congress is simply  
23 going to repeal the statute and go back to the way  
24 things were, once the litigation is over.

25           So you have a merits issue that's not -- if

1 technically moot, nearly moot. The real merits issue in  
2 the case is -- is expressly not decided by the Ninth  
3 Circuit. They say, take that back to the district  
4 court. And you say that the standing issue goes away  
5 because the government didn't appeal the standing issue  
6 at a time when the real merits issue in the case had not  
7 been decided.

8 MR. ELIASBERG: Well, two points, if I may,  
9 Justice Alito. First, the first reason that the Ninth  
10 Circuit gave for why the case wasn't moot was not  
11 voluntary cessation. The government conceded the land  
12 transfer could take up to two years to effectuate, so in  
13 the Ninth Circuit, that this case is far from moot.

14 Two years is more than enough time to file  
15 the government to file the petition for certiorari and  
16 had a ruling, both on the merits of the land on -- the  
17 cross on government property, but more important, as a  
18 number of Justices had pointed out, the question of  
19 standing to bring an Establishment Clause case, the  
20 government always have an interest in saying, this case  
21 should never have been brought. We never should had  
22 have had a judgment entered against us.

23 For the government to say, we didn't really  
24 care at that point because, two years from now, the  
25 transfer might be effectuated is not basis for them to



1     argue that there was no final judgment and no reason for  
2     us to appeal.

3                   JUSTICE GINSBURG:   I think General Kagan  
4     recognized that there isn't an example of a final  
5     injunction, where, after it's final as it can be, you  
6     can come back and say, but, now, I want to reargue the  
7     standing question that's already been determined.

8                   But there was something that I did want to  
9     ask you about, Judge O'Scanlon's opinion.   He said,  
10    if -- if you prevail and you are right, what happens in  
11    Arlington Cemetery, where there's the Argonne Cross  
12    Memorial and the Canadian Cross of Sacrifice, both right  
13    here in Arlington, what happens to them?

14                  MR. ELIASBERG:   Going back, Justice  
15    Ginsburg, to the merits on the earlier question about a  
16    cross on government property, I believe that the Argonne  
17    Cross in the national -- in memorial cemetery is  
18    extremely different.

19                  There are, in the national cemeteries,  
20    the -- the VA offers, to veterans and their family, a  
21    choice of putting up 39 different emblems and beliefs on  
22    their tombstones.   In Arlington, there is a cross that  
23    is surrounded by a sea of tombstones with symbols of the  
24    faith of all of the different service members.

25                  In that context, I don't think anyone would

1 perceive that the government was favoring one particular  
2 religion because of the variety of choices and religious  
3 symbols expressed there. That's very different from a  
4 stand-alone cross of one religious symbol that is not  
5 surrounded by any other context, other than --

6 JUSTICE SCALIA: Has the government ever  
7 turned down -- let's say the Jewish war veterans request  
8 to put up a war memorial on --

9 MR. ELIASBERG: They did. There was a  
10 request made for -- to put up a memorial on the site,  
11 and the government said no and said, our regulations  
12 forbid it.

13 JUSTICE SCALIA: I am talking about -- on  
14 this site?

15 MR. ELIASBERG: Yes.

16 JUSTICE SCALIA: You know, well, I'm not  
17 talking about this site, where there already was a  
18 memorial, but suppose the -- what I'm getting at is I  
19 don't agree with you, that -- that every time the  
20 government allows any religious symbol to be erected, it  
21 has to allow all religious symbols to be erected at the  
22 same place, so long as it is -- it is not discriminatory  
23 in -- in accepting or rejecting requests to erect  
24 religious symbols in different places.

25 I don't see why the government is convicted

1 of being discriminatory.

2 MR. ELIASBERG: I think the context here is  
3 what has the government done with respect to national  
4 memorials. The only two national memorials that are  
5 stand-alone religious symbols are of one particular  
6 religious denomination, and that's Christianity.

7 JUSTICE SCALIA: But -- but you don't --  
8 and they -- were both of them proposed by a private  
9 group, such as the Veterans of Foreign Wars?

10 MR. ELIASBERG: Well, it's Congress -- I  
11 don't know that the Veterans of Foreign Wars ever  
12 proposed that this be a national memorial. Congress  
13 designated it as one.

14 JUSTICE SCALIA: Well, but it was erected by  
15 the Veterans of Foreign Wars. I mean, do you know of  
16 any instance in which Jewish war veterans or if there is  
17 an organization of Muslim war veterans, requested to  
18 erect a memorial on public land, it was turned down?

19 MR. ELIASBERG: As I said before --

20 JUSTICE SCALIA: I just don't see why they  
21 all have to be on the same piece of land, in -- in order  
22 for the government to be impartial.

23 MR. ELIASBERG: I'm not saying that in --  
24 in -- that, in every circumstance, the government has to  
25 have lots of different symbols, but what the government

1 has done here --

2 JUSTICE SCALIA: Well, I think you are  
3 saying that, and you are saying that this has to be a  
4 public forum. In fact, I'm not even sure your -- your  
5 brief would limit it to religious symbols. You say it  
6 has to be an open forum. Right?

7 MR. ELIASBERG: Well, Justice Scalia, if I  
8 make one prefatory point, the government didn't bring to  
9 this Court the merits of the question of whether the  
10 cross was permissible on government property.

11 There is a final judgment set in this  
12 circumstance. In this context, it is not. So that  
13 question is not properly before us, but context matters,  
14 and I do think, in other circumstances, there may be  
15 religious symbols. There may be a myriad of religious  
16 symbols and the context of the situation will matter.

17 But I think if, in Arlington, for example --  
18 with respect to Justice Ginsburg's question. If, for  
19 example, a foreign government -- let's take the Canadian  
20 Cross of Sacrifice, which the government has put in its  
21 brief, was donated by a foreign government to honor  
22 people -- Americans who fought for Canada and the  
23 British Empire, in I believe it was World War I, if the  
24 State of Israel made a similar request to the United  
25 States, we would like to honor the Jews who fought in

1 Operation Iraqi Freedom because we believe that that was  
2 an important defense of the State of Israel, and the  
3 United States said, no, we are not interested, I think  
4 that that would create a quite significant  
5 constitutional violation -- or constitutional question,  
6 but it's not the case in front of us.

7 JUSTICE STEVENS: May I ask a different  
8 question, just based on your understanding of all these  
9 monuments? Are there any other federal monuments that  
10 contained crosses, other than those associated with the  
11 cemeteries?

12 MR. ELIASBERG: The one national memorial  
13 that I am aware of that has a cross, it is of Father  
14 Marquette, who was a significant historical figure. It  
15 is not a stand-alone cross. It is Father Marquette  
16 surrounded by a number of various objects that show his  
17 role as a historical figure, exploring the middle west,  
18 and he is holding a cross.

19 But, again, I think -- I agree with General  
20 Kagan that, if we honored Martin Luther King, who was a  
21 priest, or we honored -- we did something with the Old  
22 North Church which had significant historical  
23 significance, that would create a very different issue  
24 than simply a stand-alone cross, where, when the  
25 National Park Service asked its own historian to

1 determine whether it had historical value necessary to  
2 bring it within the National Register of Historic  
3 Places, the Park Service's own historian said, no, it  
4 did not.

5 CHIEF JUSTICE ROBERTS: Counsel, this  
6 probably doesn't have anything to do with anything, but  
7 I'm just kind of curious, why is this cross put up --  
8 you know, in the middle of nowhere?

9 (Laughter. )

10 MR. ELIASBERG: Because the man who  
11 originally put up the cross -- not this one, because it  
12 has been replaced a number of times, but the man who put  
13 up this particular cross, I believe was a homesteader in  
14 the area when the land was owned by the Bureau of Land  
15 Management, and I believe was a miner on the land. I  
16 hope that is correct historically. I believe it is.

17 CHIEF JUSTICE ROBERTS: Thank you.

18 General, you have 2 minutes.

19 REBUTTAL ARGUMENT OF GEN. ELENA KAGAN

20 ON BEHALF OF THE PETITIONERS

21 GENERAL KAGAN: Thank you, Mr. Chief  
22 Justice.

23 To pick up right there, this stand-alone  
24 cross was erected as a World War I memorial by veterans  
25 of World War I who had gone to the desert in California

1 to recuperate and to restore their lives.

2           And it was that situation that the -- that  
3 the Congress was presented with, was when the Ninth  
4 Circuit ruled and said that this memorial was  
5 unconstitutional, Congress had a choice. And the choice  
6 was to take down that memorial, which meant an enormous  
7 amount to veterans in the community, or to completely  
8 dissociate the government from that memorial. And what  
9 Congress did was to completely dissociate the government  
10 from that memorial while allowing some war memorial to  
11 stand.

12           JUSTICE STEVENS: How can you say that when  
13 there's a reversionary interest? How can you say it's  
14 completely dissociated? There is a reversionary  
15 interest if they don't maintain the cross, which is the  
16 monument, it goes back to the government.

17           GENERAL KAGAN: Justice Stevens, with  
18 respect, the reversionary interest says that the holder,  
19 the VFW, has to maintain a war memorial. It does not --

20           JUSTICE STEVENS: Yes, but the particular  
21 memorial described by Congress was this cross.

22           GENERAL KAGAN: No, the reversionary  
23 interest simply says: A war memorial. It does not have  
24 to be this war memorial.

25           JUSTICE STEVENS: Yes, but then it doesn't

1 -- I don't think it's fair to interpret Congress's  
2 interest to being and preserving this memorial.

3 GENERAL KAGAN: To the contrary, Justice  
4 Stevens. When Congress wanted to say "this memorial,"  
5 it knew to how to say it, because it said it in the 2002  
6 act.

7 JUSTICE STEVENS: Right.

8 GENERAL KAGAN: In the 2004 act, it said  
9 something very different. That was after the injunction  
10 had issued, so it was a completely different set of  
11 circumstances. Congress understood that an injunction  
12 against this war memorial had issued. Congress said:  
13 We are going to give this back to the VFW, but it's  
14 going to be the VFW's choice now as to what to do with  
15 it, consistent with it being some kind of war memorial.  
16 A reversionary interest of a kind that Congress often  
17 uses to -- when it transfers land. Congress -- it's a  
18 completely --

19 JUSTICE STEVENS: Do you think anyone  
20 thought there is the remotest possibility they would put  
21 up a different memorial?

22 GENERAL KAGAN: I think it's left to the  
23 VFW, and it's entirely the VFW's choice. So if tomorrow  
24 or ten years from now or 50 years from now the VFW  
25 decides, along with Respondents, that a cross is an



1 inappropriate war memorial, then they can take down that  
2 war memorial. It's no longer the government's message.

3 JUSTICE STEVENS: How can they say it's an  
4 inappropriate war memorial when Congress has designated  
5 the national memorial as, quote, "the five-foot-tall  
6 white cross" and so forth and so on? That is what is  
7 the memorial.

8 GENERAL KAGAN: But there is no -- there is  
9 no prohibition on the VFW taking down this memorial. We  
10 will just have one fewer national memorials. And --

11 JUSTICE STEVENS: Do you really think there  
12 is any possibility that would happen?

13 GENERAL KAGAN: Again, I think it is  
14 entirely up to the VFW.

15 JUSTICE STEVENS: That is not my question.

16 GENERAL KAGAN: I don't know, because I am  
17 not the VFW. It is up to the VFW as to what happens to  
18 this war memorial. That's also true of the plaque, that  
19 the plaque could -- the VFW could take down the plaque  
20 once the -- the VFW gains title to this property.

21 So what the government has done here -- and  
22 Justice Stevens, I don't want to -- of course, you are  
23 right that Congress started out thinking they --

24 JUSTICE STEVENS: They not only started it  
25 out, but they authorized the use of \$10,000 in money in

1 order to replace the very cross they had designated as a  
2 memorial.

3 GENERAL KAGAN: Justice Stevens, you are, of  
4 course, right that Congress thought at the beginning,  
5 prior to the injunction, that this war memorial should  
6 not be taken down, that there was an attachment to it in  
7 the local community, and that it was -- that it should  
8 be retained. Not an unnatural thing for Congress to  
9 want, to preserve war memorials.

10 When the injunction issued and when the  
11 court found that the -- when the Congress found that the  
12 courts had declared this display of this memorial  
13 unconstitutional, Congress said: How can we preserve  
14 this -- preserve a war memorial, very possibly this war  
15 memorial? How can we preserve a war memorial but have  
16 it not be our choice?

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
18 Counsel, counsel.

19 The case is submitted.

20 (Whereupon, at 11:06 a.m., the case in the  
21 above-entitled matter was submitted.)

22

23

24

25

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