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A CROSS TO BEAR: THE NEED TO WEIGH CONTEXT IN DETERMINING THE CONSTITUTIONALITY OF RELIGIOUS SYMBOLS ON PUBLIC LAND

CATHERINE ANSELLO*

INTRODUCTION

In *Buono v. Kempthorne*,¹ the Ninth Circuit considered whether a legislatively prescribed transfer of public land to private hands violated the district court's injunction prohibiting the display of a Latin cross² on that public land.³ The court concluded that the situation surrounding the land transfer constituted an unusual circumstance, removing the exchange from the ordinary rule that land transfers are a legitimate and effective way of negating an Establishment Clause violation.⁴ Although the court correctly determined the land transfer itself to be invalid,⁵ the court failed to adequately consider the factors supporting constitutionality of the presence of the cross prior to the land transfer.⁶ None of the four courts considering the *Buono* case gave adequate deference to the Supreme Court's charge to weigh the context of a religious symbol before the symbol is deemed unconstitutional.⁷ As a result, the *Buono* courts' all-or-nothing approach caused continued litigation and extended governmental efforts to preserve the cross.⁸

I. THE CASE

In the middle of Mojave National Preserve (hereinafter "the Preserve"), located in the Mojave Desert in California, sat a Latin

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1. *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007).

2. As the United States District Court for the Central District of California has noted, "[t]he Latin cross is the preeminent symbol of Christianity. It is exclusively a Christian symbol, and not a symbol of any other religion." *Buono v. Norton*, 212 F. Supp. 2d 1202, 1205 (C.D. Cal. 2002).

3. *Buono*, 502 F.3d at 1071.

4. *Id.* at 1077.

5. See *infra* Part IV.B.

6. See *infra* Part IV.A.

7. See *infra* Part IV.A.

8. See *infra* Part IV.A.

cross between five and eight feet tall.⁹ The National Park Service maintains and operates the Preserve.¹⁰ The federal and state governments own about ninety-five percent of the land within the Preserve.¹¹ The cross sat atop a visible rock outcropping within the Preserve, and vehicles traveling on a nearby road could see the cross from approximately 100 yards away.¹²

In 1934, before Congress created the Preserve, the Veterans of Foreign Wars erected the cross to memorialize veterans who died in the line of duty during World War I.¹³ Originally, signs erected around the cross identified it as a tribute to these veterans; however, the signs were no longer in place at the time of trial.¹⁴ The Preserve has historically been used for both secular and religious purposes. Private parties have held Easter services near the cross since 1935, and the area where the cross is located is also used as a public camping ground.¹⁵

In 1999, an individual wrote a letter to the National Park Service requesting permission to erect a stupa¹⁶ within the Preserve.¹⁷ In response, the National Park Service denied permission to construct the Buddhist symbol and agreed to remove the cross.¹⁸ Several months later, the American Civil Liberties Union (ACLU) wrote a letter to the National Park Service threatening legal action if the cross was not removed.¹⁹ In response, local citizens informed the National Park Service that there would be considerable public outcry if the organization complied with the ACLU's demands to remove the cross.²⁰ The National Park Service then informed the ACLU that it intended to remove the cross, but did not immediately remove it.²¹

9. *Buono v. Norton*, 212 F. Supp. 2d 1202, 1204–05 (C.D. Cal. 2002). The Preserve, predominately made up of federal land, stretches over about 2500 square miles. *Id.* at 1205.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* The original cross has been replaced by private individuals replaced several times since 1934. *Id.*

15. *Id.*

16. A stupa is a "dome-shaped Buddhist shrine . . ." *Id.* at 1205–06.

17. *Id.* The letter's author identified himself as Sherpa San Harold Horpa. *Id.* at 1206. Horpa, also known as Herman R. Hoops, is an acquaintance of Buono and a retired National Park Service employee. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* Indeed, the private individuals who maintained the cross refused to voluntarily remove the cross, and expressed that they would replace the cross if it were removed. *Id.*

21. *Id.*

In November 2000, a county supervisor contacted a California congressman to protest “the removal of the ‘veteran’s memorial.’”²² Within one month, Congress passed the Consolidated Appropriations Act,²³ forbidding the use of federal funds for removal of the cross.²⁴ In January 2002, Congress passed the Department of Defense and Emergency Supplemental Appropriations for Recovery From and Response to Terrorist Attacks on the United States Act (“the Emergency Supplemental Appropriations Act”), which designated the Mojave Preserve’s cross as a national memorial, and allocated funds to erect a memorial plaque near the cross.²⁵

Just before Congress passed the Emergency Supplemental Appropriations Act, Frank Buono brought suit in the United States District Court of California, seeking injunctive and declaratory relief.²⁶ Buono argued the presence of the cross on federal land violated his constitutional rights under the Establishment Clause of the First Amendment.²⁷ Defendants Gail Norton, John Reynolds, and Mary Martin filed a motion for summary judgment.²⁸

A. *Buono I*

Buono v. Norton (“*Buono I*”) considered the constitutionality of the presence of a Latin cross on federal land.²⁹ According to the court, the Establishment Clause “certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions).”³⁰ Applying the test established in *Lemon v. Kurtzman*³¹

22. *Id.*

23. Consolidated Appropriations Act, Pub. L. No. 106–554 §133, 114 Stat. 2763A-230 (2000).

24. *Id.*

25. Department of Defense and Emergency Supplemental Appropriations for Recovery From and Response to Terrorist Attacks on the United States Act, Pub. L. No. 107-117 §8137, 115 Stat. 2278–79 (2002), *codified at* 16 U.S.C. §410aaa-56.

26. *Buono v. Norton*, 212 F. Supp. 2d 1202, 1204 (C.D. Cal. 2002). In October of 2001, Allen Schwartz was added as a co-plaintiff. *Id.*

27. *Id.*

28. *Id.* at 1203–04. Defendants Norton and Reynolds work for the National Park Service, and Defendant Martin is Superintendent of the Preserve. *Id.* at 1209. Plaintiffs also subsequently filed a motion for summary judgment. *Id.* at 1204.

29. *Id.* at 1214. Defendants also challenged Plaintiffs’ standing, which was discussed in depth by the District Court and ultimately found to exist. *Id.* at 1210–14.

30. *Id.* at 1214.

31. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). A government religious practice or symbol survives an alleged Establishment Clause violation when: 1) it has a secular purpose,

(hereinafter the “Lemon test”), the district court held³² the cross violated the Establishment Clause without considering the first prong of the Lemon test “because the primary effect of the presence of the cross advances religion.”³³ The court relied heavily on a parallel Ninth Circuit case, *Separation of Church and State Committee v. City of Eugene*.³⁴ The *City of Eugene* court determined the presence of a cross was a “straightforward” violation of the second prong of the *Lemon* test, notwithstanding the fact that Congress designated the cross as a war memorial.³⁵ The court noted that while the physical setting of a particular religious symbol is important, the location of the cross in the Preserve led to the conclusion that “a reasonable observer would believe that such land and the cross are owned by the government.”³⁶ The *City of Eugene* court considered both the size of the cross and the amount of public exposure it received to be irrelevant.³⁷ Because the presence of the cross in the Preserve conveyed a message of government endorsement of religion, the court granted the plaintiffs’ motion for summary judgment, thus prohibiting any continued display of the cross.³⁸

B. *Buono II*

Following the disposition of *Buono I*, in *Buono v. Norton* (“*Buono II*”), the defendants appealed the case to the Court of Appeals for the Ninth Circuit, which heard the summary judgment motion *de novo*.³⁹ After oral arguments concluded, Congress passed the Department of Defense Appropriations Act of 2004.⁴⁰ Within the Department of Defense Appropriations Act of 2004 was Section 8121, directing the Secretary of Interior to transfer the land on which the cross was located to the Veterans of Foreign Wars Post. In return, the Secretary of the Interior received a privately owned five-acre parcel of

2) it has a primary effect that neither advances nor inhibits religion, and 3) does not foster excessive government entanglement with religion. *Id.* at 612–13.

32. *Buono*, 212 F. Supp. 2d at 1215.

33. *Id.*

34. 93 F.3d 617 (9th Cir. 1996).

35. *Id.* at 620 n.5, 618–19.

36. *Buono*, 212 F. Supp. 2d at 1216.

37. *Id.*

38. *Id.* at 1217.

39. *Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004).

40. Department of Defense Appropriations Act of 2004, Pub.L. No. 108-87, 117 Stat. 1054 (2003).

land located in the Preserve.⁴¹ Further, under Section 8121, the Secretary of the Interior was instructed to continue carrying out his duties under the Emergency Supplemental Appropriations Act.⁴² Lastly, Section 8121 provided that, if the “property is no longer being maintained as a war memorial,” the property was to revert to the United States.⁴³

In *Buono II*, the defendants appealed the judgment of *Buono I*,⁴⁴ arguing that the presence of the cross on federal land did not violate the Establishment Clause.⁴⁵ The Court of Appeals upheld the district court decision, stating that the issue was “squarely controlled” by *City of Eugene*.⁴⁶ In doing so, the appellate court rejected the defendants’ argument that visibility and location of the Preserve cross, in contrast with the *City of Eugene* cross, made their case distinguishable.⁴⁷ Instead, the court stated that “[n]ational parklands and preserves embody the notion of government ownership as much as urban parkland, and the remote location of the [Preserve rock] does nothing to detract from that notion.”⁴⁸ Additionally, the Court of Appeals determined that a reasonable observer would know that the land on which the cross sat was owned by the government; “given the ratio of publicly-owned to privately-owned land in the Preserve . . . a less well-informed reasonable observer would still believe—or at least suspect—that the cross rests on public land.”⁴⁹

41. *Id.*

42. *Id.*

43. *Id.*

44. *Buono*, 371 F.3d 543.

45. *Id.* at 548. The Court of Appeals also reconsidered Defendants’ challenges to Plaintiffs’ standing, ultimately reaching the same conclusion as the District Court. *Id.* at 545–47.

46. *Id.*

47. *Id.* at 549 (“That the [rock on which the cross sits] is not near a government building is insignificant—neither was the [City of Eugene] cross. What is significant is that the [Preserve] cross, like the [City of Eugene] cross, sits on public park land.”).

48. *Id.*

49. *Id.* at 550. The court used Justice O’Connor’s “reasonable observer” standard set forth in *Capitol Square Review & Advisory Board v. Pinette*: a reasonable observer “must be deemed aware of the history and context of the community and forum in which the religious display appears.” *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780–81 (1995).

C. Buono III

Following *Buono II*, Buono filed a motion to enforce or modify the permanent injunction against the defendants.⁵⁰ Because the Department of Defense Appropriations Act called for the sale of the public land containing the cross to private parties, Buono asked the court to “either hold that the transfer violates the current injunction, or modify that injunction to prohibit the land transfer because it violates the Establishment Clause.”⁵¹ The court refused to delay its ruling pending disposition of two Supreme Court cases, *Van Orden v. Perry* and *McCreary County v. ACLU of Kentucky*, stating:

[T]he issue here is not whether the display of the Latin cross on federal land violates the Establishment Clause Rather, the issue is whether the land transfer directed by section 8121 violates the permanent injunction or is itself an unconstitutional violation of the First Amendment Establishment Clause.⁵²

The court stated that, in the absence of unusual circumstances, the government may end its endorsement of religion through sale of the piece of property at issue.⁵³ In determining whether any unusual circumstances were present in the land transfer, the court noted that because of the reversionary clause in Section 8121, the government retained control over the property.⁵⁴ Further, designating the cross a memorial, erecting a plaque with government funds, and reaffirming the Secretary of the Interior’s duties under the Emergency Supplemental Appropriations Act indicated the government’s intent to preserve the cross, and remain actively involved with it.⁵⁵ The court found that the transfer of the land to the Veterans of Foreign Wars Post, an involved proponent of the maintenance of the cross, qualified as an “unusual circumstances” exception.⁵⁶ The court also noted that the land transfer decision did not follow the usual administrative

50. *Buono v. Norton*, 364 F. Supp. 2d 1175, 1176 (C.D. Cal. 2005). Plaintiff Schwartz had died before the motion was filed. *Id.* at 1177 n.2.

51. *Id.* at 1177.

52. *Id.* at 1178. The court also refused to postpone ruling on the issue until the land transfer was completed, as it was clear to the court that the land transfer would go forward. *Id.*

53. *Id.* (quoting *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 492 (7th Cir. 2000)).

54. *Id.* at 1180.

55. *Id.*

56. *Id.* at 1180–81.

process.⁵⁷ Traditionally, the Secretary of the Interior retains the right to make land transfers, but in this instance, the government itself made the decision.⁵⁸ Lastly, the court categorized the government's efforts at saving the cross as "herculean" and found that the complex history of the case was itself an "unusual circumstance."⁵⁹ Therefore, the land transfer violated the permanent injunction granted by the court in *Buono I*.⁶⁰ The government appealed the disposition to the Ninth Circuit.⁶¹ Thus, the Ninth Circuit was called upon to determine whether the district court abused its discretion in concluding that the Section 8121 land exchange violated the court-ordered permanent injunction against the presence and maintenance of a Latin cross on federal land in *Buono v. Kempthorne (Buono IV)*.⁶²

II. LEGAL BACKGROUND

The Establishment Clause of the First Amendment to the United States Constitution reads: "Congress shall make no law respecting an establishment of religion."⁶³ Supreme Court jurisprudence sets forth several tests to determine if an Establishment Clause violation exists, including the *Lemon* test,⁶⁴ whether a governmental behavior endorses a particular religion,⁶⁵ or whether a secular purpose behind government behavior predominates.⁶⁶ The Supreme Court has repeatedly emphasized the need to examine context in deciding whether a particular religious symbol present on public property violates the Establishment Clause.⁶⁷

57. *Id.* at 1181.

58. *Id.* The court noted that, although this fact was not determinative in itself, it lent itself to the conclusion that the government actively sought to evade the court-ordered injunction. *Id.*

59. *Id.* at 1181–82.

60. *Id.* at 1182.

61. *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007).

62. *Id.* at 1071.

63. U.S. CONST. amend. I.

64. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

65. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989).

66. *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005).

67. *See Lynch v. Donnelly*, 465 U.S. 668 (1984); *Allegheny*, 492 U.S. 573; *McCreary*, 545 U.S. 844; *Van Orden v. Perry*, 545 U.S. 677 (2005).

*A. The Supreme Court Relies on Context to Determine the
Constitutionality of the Presence of Religious Symbols on Public
Property*

1. The Importance of Context Revealed: Lynch v. Donnelly

Within the setting of Establishment Clause jurisprudence, the examination of a symbol's context can involve investigating the location of the religious symbol or the manner in which it is displayed. In *Lynch*, the Supreme Court considered whether the Establishment Clause barred a municipality's display of a crèche, or Nativity scene, as part of its Christmas display.⁶⁸ The City of Pawtucket, Rhode Island's annual Christmas display included many traditional Christmas figures, such as reindeer, a Christmas tree, colored lights, candy-striped poles, and the crèche.⁶⁹ The *Lynch* case arose when the Rhode Island affiliate of the ACLU and its individual members brought suit claiming that the inclusion of the crèche in the display violated the Establishment Clause.⁷⁰

In considering the display's constitutionality, the Court stated that the "Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."⁷¹ The Court noted that the three-prong *Lemon* test is often applied to determine whether government behavior violates the Establishment Clause.⁷² However, the Court identified the context of the crèche as dispositive in its decision.⁷³ Ultimately, the Court concluded that the district court committed an error in exclusively focusing on the crèche, instead of the context of the Christmas season.⁷⁴ Thus, the Supreme Court found that any benefit to religion resulting from the crèche's display was "indirect, remote, or incidental."⁷⁵ Further, the complete lack of evidence of political divisiveness over the crèche in its forty-

68. *Lynch*, 465 U.S. at 670–71.

69. *Id.* at 671.

70. *Id.*

71. *Id.* at 673.

72. *Id.* at 679 (stating the *Lemon* test as "whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion.").

73. *Id.*

74. *Id.* at 680.

75. *Id.* at 683; *Comm. for Pub. Educ. and Religious Liberty v. NyQuist*, 413 U.S. 756, 771 (1973).

year history indicated a lack of excessive governmental entanglement with religion.⁷⁶

Justice O'Connor concurred in the result.⁷⁷ She identified the need for an examination of "government endorsement or disapproval of religion" to clarify the *Lemon* test.⁷⁸ She explained, "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."⁷⁹ Justice O'Connor's method of determining whether a religious symbol sends a message of endorsement is to scrutinize "what viewers may fairly understand to be the purpose of the display,"⁸⁰ considered in the context in which the symbol appears.⁸¹ Here, the "overall holiday setting"⁸² as the relevant "particular physical setting"⁸³ indicated that a public holiday, rather than a religious holiday, was being celebrated.⁸⁴ Like the majority, O'Connor identified the fact that the display had caused no political divisiveness prior to the present lawsuit as substantial evidence that it did not communicate a message of government endorsement of religion.⁸⁵

2. Further Developing a Context Test: *Allegheny v. ACLU*

In *Allegheny v. ACLU*, the Allegheny County courthouse contained two holiday displays: a crèche and a menorah.⁸⁶ The crèche, located on the Grand Staircase within the courthouse, was topped with an angel and a banner stating "Gloria in Excelsis Deo!"⁸⁷ The menorah, displayed a block away and outside of the City-County Building, sat next to a large Christmas tree.⁸⁸ A sign sitting at the base of the tree identified the mayor's name and declared the city's "salute to liberty."⁸⁹

76. *Lynch*, 465 U.S. at 684–85.

77. *Id.* at 687 (O'Connor, J., concurring).

78. *Id.* at 689.

79. *Id.* at 688.

80. *Id.* at 692.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 693.

86. *County of Allegheny v. ACLU*, 492 U.S. 573, 578 (1989).

87. *Id.* at 580. "Gloria in Excelsis Deo!" means "Glory to God in the highest . . ." *Id.* at 580 n.5.

88. *Id.* at 581–82.

89. *Id.* at 582.

Considering the crèche's setting, standing alone, within the main part of a building that served as the "seat of county government,"⁹⁰ the Court concluded the display was unconstitutional.⁹¹ The Court cited with approval Justice O'Connor's concurrence in *Lynch*,⁹² whose test "turns upon the context in which the contested object appears."⁹³ The *Alleghany* decision relied upon whether the crèche and menorah, "in their respective particular physical settings," endorses or suppresses religious beliefs.⁹⁴ Nothing counteracted the display's sectarian message, because the crèche stood alone.⁹⁵ In light of its context, the crèche represented governmental observance of Christmas "as a Christian holiday" as opposed to an observance of Christmas as a "cultural phenomenon,"⁹⁶ and thus was considered unconstitutional.

In contrast to the crèche, the Court stated that the determination of constitutionality of the menorah's location "may well present a closer constitutional question."⁹⁷ Because the County displayed the menorah along with a sign and a Christmas tree, the Court concluded that the message received by viewers was of the state's recognition of Christmas and Chanukah as secular holidays, rather than an endorsement of particular religions.⁹⁸ The Court also noted that, "[w]hile no sign can disclaim an overwhelming message of endorsement, an 'explanatory plaque' may confirm that in particular contexts the government's association with a religious symbol does not represent the government's sponsorship of religious beliefs."⁹⁹ Thus, the Court found the display of the menorah, given its context, to be constitutionally permissible.¹⁰⁰

90. *Id.* at 599.

91. *Id.* at 602.

92. *Id.* at 595 ("Although Justice O'Connor joined the majority opinion in *Lynch*, she wrote a concurrence that differs in significant respects from the majority opinion. The main difference is that the concurrence provides a sound analytical framework for evaluating governmental use of religious symbols.").

93. *Id.*

94. *Id.* at 597.

95. *Id.* at 598.

96. *Id.* at 601.

97. *Id.* at 613.

98. *Id.* at 616.

99. *Id.* at 619 (internal citations omitted).

100. *Id.* at 621.

3. *Application of the Context Test Following Lynch and Allegheny*

Subsequent cases in federal courts of appeals have clarified the tests set forth in *Allegheny* and O'Connor's concurrence in *Lynch*. For example, in *Doe v. City of Clawson*, a private party challenged the presence of a crèche among secular Christmas symbols on the front lawn of City Hall in Clawson, Michigan.¹⁰¹ In light of the pending Supreme Court decision in *Allegheny*, the district court issued a stay.¹⁰² Following the Supreme Court's decision, the district court granted summary judgment to the City.¹⁰³ The plaintiff then appealed to the Court of Appeals for the Sixth Circuit.¹⁰⁴

In light of *Allegheny*, the court found three factors dispositive when considering whether governmental endorsement exists: context, composition, and location.¹⁰⁵ The court in *Doe* determined that: 1) the Christmas holiday season constitutes the context of a challenged crèche; 2) the figures and objects displayed along with the crèche make up its composition; and 3) the site upon which the crèche is displayed represents its location.¹⁰⁶ The court then concluded that the display of the crèche at issue was constitutional.¹⁰⁷ Because the City placed the crèche along with a secular symbol, it conveyed a "message of pluralism" and not an endorsement of Christianity.¹⁰⁸

Similarly, in *Murray v. City of Austin*, the Court of Appeals for the Fifth Circuit examined the issue of context in determining the constitutionality of a city insignia, which was used on city vehicles, bills, uniforms, buildings, and letterhead, that contained a Latin cross.¹⁰⁹ The court considered:

Austin did not have an improper purpose in adopting the insignia; its long and unchallenged use; its non-proselytizing effect; that in its context, it does not endorse religion in any true or meaningful sense of the word 'endorsement'; and that requiring the City to

101. *Doe v. City of Clawson*, 915 F.2d 244, 245 (6th Cir. 1990).

102. *Id.* at 246.

103. *Id.*

104. *Id.*

105. *Id.* at 247.

106. *Id.*

107. *Id.* at 248.

108. *Id.* at 249.

109. *Murray v. City of Austin*, 947 F.2d 147, 149–50 (5th Cir. 1991).

remove all displays of the insignia, arguably evinces not neutrality, but instead hostility, to religion.¹¹⁰

As a result, the court determined that no Establishment Clause violation existed.¹¹¹ Thus, the court identified the history of a particular religious symbol as a factor for courts to consider when examining context.¹¹²

4. Recent Developments: *McCreary County v. ACLU* and *Van Orden v. Perry*

The Court has recently emphasized the importance of context in its seminal cases involving replicas of the Ten Commandments: *McCreary County v. ACLU*¹¹³ and *Van Orden v. Perry*.¹¹⁴ In *McCreary*, the courthouse in McCreary County, Kentucky hung large copies of the Ten Commandments.¹¹⁵ Upon suit by the ACLU, the County expanded its display, including a copy of a resolution identifying the Ten Commandments as “the precedent legal code upon which the civil and criminal codes of . . . Kentucky are founded.”¹¹⁶ Ultimately, the district court ordered the County to remove the display.¹¹⁷ The County responded by hanging additional documents, such as the Magna Carta, the Declaration of Independence, and the lyrics of the Star Spangled Banner, beside the Ten Commandments.¹¹⁸

Justice Souter, writing the opinion of the Court, held that a secular purpose must predominate for a display to be held constitutional under the Establishment Clause, with the outcome of the case turning on the governmental purpose behind the erection of a particular display.¹¹⁹ Souter emphasized that “the eyes that look to purpose belong to an ‘objective observer,’ one who takes account of the traditional external signs that show up in the ‘text, legislative history, and implementation of the statute, or comparable official act.’”¹²⁰ Indeed, purpose is understood “in light of context.”¹²¹ Prior to

110. *Id.* at 158.

111. *Id.*

112. *Id.* at 156. The court distinguished the case at bar from a Seventh Circuit case, *Harris v. City of Zion*, in part because the insignia adopted by the City of Zion, containing religious symbols, “was adopted for an express religious purpose.” *Id.* at 157.

113. *McCreary County v. ACLU*, 545 U.S. 844 (2005).

114. *Van Orden v. Perry*, 545 U.S. 677 (2005).

115. *McCreary*, 545 U.S. at 851.

116. *Id.* at 853.

117. *Id.* at 855.

118. *Id.* at 856.

119. *Id.* at 861.

120. *Id.* at 862 (quoting *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290, 308 (2000)).

any litigation, the County's first display of the Ten Commandments stood alone, undermining any argument of sectarian purpose.¹²² Justice Souter stated, "[w]hen the government initiates an effort to place this statement alone in public view, a religious object is unmistakable."¹²³ Further, the Court noted that the second display's "unstinting focus" was on religion.¹²⁴ In light of the previous displays, the Court found it entirely unreasonable that an objective observer would believe the County's claims that it had suddenly abandoned its religious purpose by the time of its third display.¹²⁵ Lastly, the Court noted that a display within its own courtroom depicting Moses with a copy of the Ten Commandments was distinguishable from the McCreary County display.¹²⁶ The Supreme Court display contains the secular Commandments only, and Moses stands "in the company of seventeen other lawgivers, most of them secular figures"¹²⁷ It is therefore unlikely that a reasonable observer, viewing the context of the display, would discern a religious purpose.¹²⁸

In contrast, in *Van Orden v. Perry*, the Court found a religious symbol identical to the one at issue in *McCreary* to be constitutional. In *Van Orden*, the grounds surrounding the Texas State Capitol contained various markers allegedly commemorating Texas history.¹²⁹ Among the markers was a six-foot-high monument of the Ten Commandments.¹³⁰ The Court noted that, although it must recognize and maintain a separation between church and state, it need not act with hostility towards religion or require the government never to recognize the Nation's religious heritage.¹³¹ The location of the Ten Commandments monument in this case constituted a "far more passive use" than other displays of the Ten Commandments.¹³² Further, the inclusion of the Ten Commandments within a group of other monuments indicated that the display held both a religious and secular

121. *Id.* at 874.

122. *Id.* at 868–69.

123. *Id.* at 869.

124. *Id.* at 870.

125. *Id.* at 872–73.

126. *Id.* at 874.

127. *Id.*

128. *Id.*

129. *Van Orden v. Perry*, 545 U.S. 677, 681 (2005).

130. *Id.*

131. *Id.* at 683–84.

132. *Id.* at 691.

significance.¹³³ The Court therefore determined that the display did not violate the Establishment Clause.¹³⁴

Justice Breyer concurred in the judgment, acknowledging the importance of context in determining the constitutionality of a challenged religious symbol.¹³⁵ In addition, he stressed the fact that the monument's presence caused no litigation for 40 years.¹³⁶ To Breyer, "those [forty] years suggest more strongly than can any set of formulaic tests" that visitors to the State Capitol consider the religious portion of the tablets as indicative of a broader "cultural heritage."¹³⁷ Breyer also emphasized that the history behind the monument, unlike in *McCreary*, did not indicate a clear governmental religious motivation.¹³⁸

Thus, Supreme Court and lower court precedent has consistently recognized the need to examine context when weighing a religious symbol's constitutionality, considering factors such as the symbol's location, the manner in which it is displayed, and its relation to surrounding symbols, if any.¹³⁹ In addition, courts have given weight to the symbol's purpose as apparent to a reasonable observer, and the length of its unchallenged existence.¹⁴⁰

B. The Ninth Circuit Previously Evinced an Unwillingness to Weigh Context In Determining the Constitutionality of Religious Displays

In *Separation of Church and State Comm. v. City of Eugene*,¹⁴¹ the Ninth Circuit did not examine context when adjudicating the claim of an Establishment Clause violation. At issue in *City of Eugene* was a fifty-one foot Latin cross placed by private individuals within a public park.¹⁴² Almost immediately, litigation ensued.¹⁴³ In response, the

133. *Id.* at 691–92.

134. *Id.*

135. *Id.* at 701 ("In certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message but also a secular moral message (about proper standards of social conduct). And in certain contexts, a display of the tablets can also convey a historical message (about a historic relation between those standards and the law) —a fact that helps to explain the display of those tablets in dozens of courthouses throughout the Nation, including the Supreme Court of the United States.").

136. *Id.* at 702.

137. *Id.* at 702–03.

138. *Id.* at 703.

139. See discussion *supra* Part II.A.

140. See discussion *supra* Part II.A.

141. *Separation of Church and State Comm. v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996). See also *supra* notes 33–38.

142. *Id.* at 618.

voters of the city approved an amendment to the City Charter, naming the cross a war memorial.¹⁴⁴ Further, the City placed a plaque at the base of the cross, dedicating the cross to war veterans.¹⁴⁵ Nonetheless, the Ninth Circuit declared that the presence of the cross “clearly represents governmental endorsement of Christianity.”¹⁴⁶ It emphasized that, regardless of how a particular religious symbol may be characterized, the only real issue is how the symbol is reasonably perceived.¹⁴⁷ It concluded that “there [was] no question that the Latin cross is a symbol of Christianity . . . “ and its presence on public land was unconstitutional.¹⁴⁸

Judge O’Scannlain concurred in the result, asserting that, although the court was ultimately correct in the disposition of the case, it failed sufficiently to address the complexity of the issue or apply the correct legal standard.¹⁴⁹ In his view, *Allegheny* required the court to engage in a more meticulous scrutiny of the context of the display than it did, specifically analyzing “the cross’ historical significance as an officially-designated war memorial.”¹⁵⁰ He believed that the presence of a plaque identifying the cross as a war memorial along with the setting of the cross supported an argument for constitutionality; the cross sat in isolation away from government structures, and therefore, it was plausible that the public would not make a connection between the symbol and government.¹⁵¹ Nonetheless, O’Scannlain ultimately concluded that observers could indeed reasonably perceive the presence of the cross on public land as constituting government endorsement of religion.¹⁵² Therefore, the court found that the cross violated the Establishment Clause.¹⁵³

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 619.

147. *Id.*

148. *Id.* at 620.

149. *Id.* (O’Scannlain, J., concurring).

150. *Id.* at 624.

151. *Id.* at 625–26.

152. *Id.* 626.

153. *Id.*

C. Once Land is Sold, Courts Must Apply an “Unusual Circumstances” Test to Determine the Existence of an Establishment Clause Violation

Although the presence of a religious symbol on public property is a focal point of Establishment Clause jurisprudence, the validity of sale of public land containing a religious symbol is also a matter falling within the ambits of the Establishment Clause. In *Mercier v. Fraternal Order of Eagles*, the Court of Appeals for the Seventh Circuit considered the constitutionality of a monument of the Ten Commandments sitting in a public park in La Crosse, Wisconsin.¹⁵⁴ Although its presence did not raise any problems for twenty years, in 2001, the Freedom from Religion Foundation asked the City to remove the monument.¹⁵⁵ To resolve the issue, the City eventually decided to sell the land on which the monument sat to the Fraternal Order of Eagles, the group which had originally placed the monument in the park.¹⁵⁶ Once sold, the Fraternal Order of Eagles erected a fence around the monument and hung a private property sign.¹⁵⁷ Nonetheless, the Freedom from Religion Foundation challenged the sale as constituting an impermissible Establishment Clause violation.¹⁵⁸

The Seventh Circuit concluded that the sale of land was not an independent Establishment Clause violation.¹⁵⁹ The court noted that, “absent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion.”¹⁶⁰ Indeed, it is the charge of a court addressing an allegation of unconstitutionality to look at the substance of the sale in addition to its form to determine whether government endorsement of religion remains.¹⁶¹ The court identified actions that would undermine the legitimacy of a sale:

- a sale that did not comply with applicable state law governing the sale of land by a municipality; a sale to a straw purchaser that left the City with continuing power

154. *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 694 (7th Cir. 2005).

155. *Id.* at 696.

156. *Id.* at 696–97.

157. *Id.* at 697–98.

158. *Id.* at 698.

159. *Id.* at 705.

160. *Id.* at 700 (quoting *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000)).

161. *Id.*

to exercise the duties of ownership; or a sale well below fair market value resulting in a gift to a religious organization.¹⁶²

None of these factors were present in *Mercier*.¹⁶³ Additionally, the *Mercier* court stated that the location of the monument was noteworthy because the land was not located near a government building and it was not in a particularly prominent location within the park.¹⁶⁴ Lastly, the court noted the “somewhat extensive efforts” the Fraternal Order of Eagles took to identify the land as private property.¹⁶⁵ Thus, the sale was deemed constitutional.¹⁶⁶

Similarly, the U.S. District Court for the District of Maryland applied the unusual circumstances test in weighing the validity of a land sale.¹⁶⁷ In *Chambers v. City of Frederick*, a public memorial ground contained a copy of the Ten Commandments.¹⁶⁸ In response to litigation threatened by the ACLU, the city voted to sell the monument and the land on which it sat.¹⁶⁹ Nonetheless, the ACLU brought suit, alleging that the sale constituted a sham transaction.¹⁷⁰ In adjudicating the issue, the district court adopted the unusual circumstances test as set forth by the Seventh Circuit and ultimately concluded that there was no evidence of unusual circumstances behind the transaction.¹⁷¹ Further, to determine whether the sale constituted an endorsement of religion, the court applied the *Lemon* test.¹⁷² The court held that a government’s own characterization of the purpose behind its actions is entitled to deference, and here there was no evidence that the city’s alleged secular purpose was insincere.¹⁷³ In addition, the court stated that a reasonable observer familiar with the history behind the monument would not believe that the government was endorsing a religious message, but instead would acknowledge that the sale was an

162. *Id.* at 702 (internal citation omitted).

163. *Id.*

164. *Id.* at 703.

165. *Id.* at 703–04.

166. *Id.* at 704.

167. *Chambers v. City of Frederick*, 373 F. Supp. 2d 567, 572 (D. Md. 2005).

168. *Id.* at 569–70.

169. *Id.* at 570.

170. *Id.* at 571. The ACLU alleged that the sale was suspect because the purchaser’s bid was lower than other bidders’. *Id.* at 572.

171. *Id.*

172. *Id.*

173. *Id.* at 573.

attempt to remove a government association with a religious symbol.¹⁷⁴ The court therefore found the sale to be constitutional.¹⁷⁵

III. THE COURT'S REASONING

In *Buono II*, The Ninth Circuit held that the district court did not err in concluding that the land transfer violated the permanent injunction granted by the trial court, and that the government violated the Establishment Clause through continued endorsement of a particular religion.¹⁷⁶ The court also found that the land transfer under Section 8121 was invalid because the various government statutes that were enacted indicated continued government oversight and control of the cross.¹⁷⁷ Through Section 8121, the National Park Service retained supervisory and management obligations over the property, and the reversionary clause within Section 8121 ensured that the government would receive the property in the event it was not used as a “war memorial,” which the court noted meant the cross itself.¹⁷⁸ Further, the Ninth Circuit reaffirmed the district court’s conclusion that the method used to effectuate the land exchange was suspect.¹⁷⁹ Not only was the land exchange made by Congress, but Congress did not even have a hearing before enacting the land transfer and did not provide for open bidding.¹⁸⁰ In addition, the government-selected beneficiaries of the transfer had a personal interest in preserving the cross.¹⁸¹ The court noted that the government’s history of attempting to preserve the cross comported with a similar government interest.¹⁸²

Lastly, the court touched on the First Amendment issue of the presence of a religious symbol on federal land and concluded that the cross’ presence did indeed violate the Establishment Clause.¹⁸³ It stated that a reasonable observer charged with knowledge of the history of the cross “would know of the government’s attempts to preserve it and the denial of access to other religious symbols.”¹⁸⁴ The court further asserted that even if a person did not have knowledge of

174. *Id.*

175. *Id.*

176. *Buono v. Kempthorne*, 502 F.3d 1069, 1081–86 (9th Cir. 2007).

177. *Id.* at 1082–83.

178. *Id.* at 1083–84.

179. *Id.* at 1084–85.

180. *Id.* at 1084.

181. *Id.* at 1085.

182. *Id.*

183. *Id.* at 1086.

184. *Id.*

the cross' history, he or she would still view the presence of the cross as a government endorsement of religion because preserves are widely associated with government ownership.¹⁸⁵

IV. ANALYSIS

In *Buono v. Kempthorne*, the Ninth Circuit held that the government's transfer of land containing a religious symbol to private hands violated the Establishment Clause because the government retained supervisory control over the land.¹⁸⁶ Further, the history of the cross indicated a strong governmental interest in endorsing a particular religion.¹⁸⁷ Although the court's final adjudication of the land transfer issue was correct,¹⁸⁸ the court failed sufficiently to weigh context in its consideration of the constitutionality of the presence of a cross on federal land.¹⁸⁹ Had the court followed Supreme Court jurisprudence more carefully, the string of government responses to the disposition of the original case could have been avoided.¹⁹⁰ Indeed, by steadfastly refusing to weigh context, the four courts that considered the *Buono* issue exuded the appearance of partiality, denied the parties a fair trial, and may have contributed to unnecessary additional litigation.¹⁹¹ To avoid such a result, the *Buono* courts should have more carefully considered the history of the cross, its location, and its manner of display.¹⁹²

A. The Ninth Circuit did not Adequately Examine Context in its Determination of the Constitutionality of the Presence of the Cross within the Preserve

1. A Closer Examination of Context was Necessary in Order to Avoid Evincing Hostility Towards Religion

The Supreme Court has repeatedly acknowledged the importance of context in determining the constitutionality of religious

185. *Id.*

186. *Id.* at 1082–85.

187. *Id.* at 1085.

188. *See infra* Part IV.B.

189. *See infra* Part IV.A.

190. *Id.*

191. *Id.*

192. *Id.*

symbols on public land.¹⁹³ In the benchmark *Lynch* and *Allegheny* cases, the location of the religious symbols and the manner in which they were displayed were necessary dispositive contextual issues, requiring fact-specific inquiries.¹⁹⁴ In *Allegheny*, “the Supreme Court outlined a methodology and a standard for lower courts to follow, rather than a bright-line rule of decision-making.”¹⁹⁵ The Court found the menorah displayed alongside a Christmas tree was constitutionally sound, although the crèche standing alone was not.¹⁹⁶ In the *Buono* case, the cross stood alone, much like the crèche in *Allegheny*, with nothing to offset its religious meaning.¹⁹⁷ However, unlike that crèche, the cross was nowhere near a government building, instead sitting in the middle of a desert.¹⁹⁸ Under Supreme Court precedent, the *Buono* courts were charged with the responsibility of engaging in a fact-specific examination of the particular cross at hand, considering its context.¹⁹⁹

Both the *Lynch* and *Van Orden* Courts acknowledged a religious symbol can take on a constitutionally appropriate “passive use.”²⁰⁰ The Establishment Clause ensures “that the government [does] not coerce anyone to support or participate in religion or its exercise by force of law or threat of penalty.”²⁰¹ The cross’ remote and isolated

193. See *Lynch v. Donnelly*, 465 U.S. 668 (1984); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005).

194. *Allegheny*, 492 U.S. at 598–600, 620.

195. Lior J. Strahilevitz, *This is not a Crèche*, 107 YALE L.J. 1969, 1970 (1997).

196. *Allegheny*, 492 U.S. at 598–600, 620.

197. *Buono v. Norton*, 212 F. Supp. 2d 1202, 1205 (C.D. Cal. 2002).

198. *Id.* at 1204.

199. See, e.g., *Allegheny*, 492 U.S. at 602, 617–18 (finding that a crèche, standing alone, was unconstitutional, while a nearby menorah, displayed along with a secular symbol and a sign, was not unconstitutional).

200. *Lynch v. Donnelly*, 465 U.S. 668, 685 (1984) (“The crèche, like a painting, is passive....”); *Van Orden v. Perry*, 545 U.S. 677, 691 (2005) (“The placement of the Ten Commandments monument on the Texas State Capitol grounds is a far more passive use of those texts than was the case in *Stone [v. Graham]*, where the text confronted elementary school students every day.”) Although the decision in *Van Orden* came after the first two *Buono* decisions, *Van Orden* and *McCreary* could have been given deference in the later *Buono* cases. Other federal courts have issued stays when dispositive issues were before the Supreme Court. See *Doe v. City of Clawson*, 915 F.2d 244, 246 (6th Cir. 1990). Instead, the *Buono III* court denied the defendants’ request to delay its ruling until *McCreary* and *Van Orden* were decided, stating that the cases were “inapposite” to the issue at bar because it had already been determined that the cross violated the Establishment Clause. *Buono v. Norton*, 364 F. Supp. 2d 1175, 1177–78 (C.D. Cal. 2005).

201. Trisha A. Vicario, *Religious Monuments under Attack: Undermining Religion for the Benefit of the Irreligious in Books v. City of Elkhart*, 25 HAMLINE L. REV. 151, 187 (2001). Several Supreme Court Justices support the view that the Establishment Clause only protects against coerced religious behavior. See *Lee v. Weisman*, 505 U.S. 577 (1992).

location supports a finding that the cross did not confront citizens of California every day in an egregious manner nor coerce them into religious practice, instead playing a passive role in any promotion of religion.²⁰² By failing to examine the impact of the “particular physical setting”²⁰³ of the cross, the *Buono* courts committed error. Instead, they “conclude[d] that the size of a cross and the number of people who view it are not important for deciding whether a reasonable observer would perceive the cross located on federal land as government endorsement or disapproval of religion.”²⁰⁴ However, where a symbol results in “indirect, remote, or incidental” benefit to religion, as existed in the case at bar, a court should find its presence to be constitutional.²⁰⁵

Additionally, it is notable that the *Allegheny*²⁰⁶ Court did *not* find that the crèche and menorah’s display in the heart of county government, within or next to clearly identifiable government buildings, was in itself indicative of unconstitutionality.²⁰⁷ From this holding, one may conclude that a religious symbol is not automatically unconstitutional when it is present in a clearly demarcated government building.²⁰⁸ As such, the Ninth Circuit should not conclusively deem a religious symbol sitting nowhere near a government building unconstitutional simply because of its presence on federal land.²⁰⁹ Notably, the two courts that were in the best position to consider the Establishment Clause issue, when the government had not yet sold the land on which the cross sat, addressed it very little in their argument.²¹⁰ The *Buono I* court’s discussion of the Establishment Clause issue took up only three and a half pages of its fifteen page

202. See *Van Orden*, 545 U.S. at 691 (describing the “passive” location of the Ten Commandments monument at issue).

203. *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).

204. *Buono*, 212 F. Supp. 2d at 1216.

205. *Lynch*, 465 U.S. at 683 (internal citation omitted).

206. *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

207. See *Vicario*, *supra* note 201, at 181 (“What the [*Books v. City of Elkhart*] court failed to consider was that Supreme Court precedent does not dictate that religious symbols located near city buildings are unconstitutional. Rather, the Supreme Court has stated that the constitutionality of a city or state’s display depends on the context of the display to determine whether it detracts from the display’s religious message.”).

208. See generally, *Allegheny*, 492 U.S. 573.

209. *Buono*, 212 F. Supp. 2d at 1216 (“[T]he cross is on federal land, and the court concludes from the uncontroverted material facts that a reasonable observer would believe that such land and the cross are owned by the government.”).

210. By the time of *Buono III*, the constitutionality of the land transfer became the forefront issue in the case. See *Buono v. Norton*, 364 F. Supp. 2d 1175, 1177 (C.D. Cal. 2005).

opinion,²¹¹ while the *Buono II* court's entire opinion spanned only seven pages, with three devoted to the Establishment Clause.²¹² As Judge O'Scannlain noted in his concurrence in *City of Eugene*, the issue of constitutionality of religious symbols on public property deserves a more searching examination than what was given.²¹³

Despite a cross' inherently religious nature, its display on government land is not *per se* unconstitutional.²¹⁴ In fact, had private citizens erected the display in a public forum instead of in the Preserve, its presence would have been *per se* constitutional.²¹⁵ Of immense importance is the fact that the Supreme Court has explicitly directed that the Establishment Clause mandates accommodation and bars hostility towards religion.²¹⁶ As the Fifth Circuit recognized, requiring a municipality to remove its challenged religious symbol can indicate an impermissible hostility, rather than neutrality, towards that religion, when its context does not warrant removal.²¹⁷ Courts must therefore be careful to weigh all dispositive contextual considerations surrounding a religious symbol in order to avoid an appearance of hostility towards that religion.

Further, the Establishment Clause's mandate of separation of church and state²¹⁸ means that the State may not create a national church.²¹⁹ Such an institutional separation does not contemplate a

211. See *Buono*, 212 F. Supp. 2d at 1214–17.

212. *Buono v. Norton*, 371 F.3d 543, 548–50 (9th Cir. 2004).

213. *Separation of Church and State Comm. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996) (O'Scannlain, J., concurring).

214. Joshua D. Zarrow, *Of Crosses and Crèches: The Establishment Clause and Publicly Sponsored Displays of Religious Symbols*, 35 AM. U. L. REV. 477, 492 nn. 92–93 (1985) (citing cases in which the display of crosses on public land has been held not to violate the Establishment Clause).

215. As the Supreme Court has noted, “[t]he right to use government property for one's private expression depends upon whether the property has by law or tradition been given the status of a public forum, or rather has been reserved for specific official uses. If the former, a State's right to limit protected expressive activity is sharply circumscribed: It may impose reasonable, content-neutral time, place, and manner restrictions... but it may regulate expressive *content* only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest.” *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753, 761 (1995) (internal citations omitted). Thus, when religious expression is “(1) purely private and 2) occurs in a traditional and designated public forum,” that expression does not violate the Establishment Clause. *Id.* at 770.

216. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

217. See *Murray v. City of Austin*, 947 F.2d 147, 158 (5th Cir. 1991).

218. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

219. Andrew R. Cogar, *Government Hostility to Religion: How Misconstruction of the Establishment Clause Stifles Religious Freedom*, 105 W. VA. L. REV. 279, 286 (2002). For a discussion contrasting Thomas Jefferson's view that the Establishment Clause implies “a wall

complete ban on all public religious expression,²²⁰ which would in fact favor irreligion over religion.²²¹ Quite the contrary, “the Establishment Clause insulates religious groups from government hostility by preventing the federal government from engaging in *sectarian* favoritism.”²²² As such, courts are required to engage in “benevolent neutrality” when judging religious issues.²²³ Under a charge of benevolent neutrality, no court could constitutionally exhibit bias in favor of those who opposed the presence of the cross in the Preserve, over those private citizens who placed the cross in the Preserve and favored its maintenance.²²⁴ At the very least, the Supreme Court’s admonition against hostility towards religion means a fair day in court for all parties, both religious and non-religious.

Although certainly not controlling, the fact that citizens of the surrounding area strongly supported maintenance of the cross²²⁵ should have brought pause to the *Buono* courts.²²⁶ The Supreme Court once stated that “[w]e are a religious people whose institutions presuppose a Supreme Being.”²²⁷ Indeed, “two thirds of [American] citizens consider their religious beliefs ‘very important’ . . . [and] at least ninety percent of Americans profess a belief in God.”²²⁸ By issuing conclusory opinions without considering context, the *Buono*

of separation between church and State” to James Madison’s view that the Clause takes away the state’s power to create a national church, *see* Vicario, *supra* note 201, at 162–64.

220. Cogar, *supra* note 219, at 285 (“[T]he Founders and the First Congress agreed that religion not only must be vigorously protected, but also should play an integral role in public life”); *id.* at 287–88 (“[T]he strict separationist doctrine contravenes the purpose of the Religion Clauses in that it serves to exclude religion from ‘public life and discourse’—a notion that undoubtedly would appall the Founding Fathers”) (internal citations omitted).

221. *See* Brown v. Gilmore, 258 F.3d 265, 275 (4th Cir. 2001) (“This authorized, and sometimes mandatory, accommodation of religion is a necessary aspect of the Establishment Clause jurisprudence because, without it, government would find itself effectively and unconstitutionally promoting the absence of religion over its practice.”) (internal citation omitted). *See also* Vicario, *supra* note 201, at 173 (arguing that, by denying the right of the religious to adorn a public lawn with a monument of the Ten Commandments, the 7th Circuit in fact expanded the rights of the irreligious).

222. Cogar, *supra* note 219, at 284.

223. *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 669 (1970).

224. *Id.* (stating a requirement that a court engage in “benevolent neutrality”).

225. *Buono v. Norton*, 212 F. Supp. 2d 1202, 1206 (C.D. Cal. 2002).

226. The First Amendment is certainly not a majoritarian provision, in which the desires or beliefs of a majority override minority beliefs in society. Nonetheless, the Ninth Circuit was required to give equal consideration to both arguments, especially considering the public and political fervor in support of the cross’ maintenance.

227. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

228. Cogar, *supra* note 219, at 280.

courts²²⁹ gave insufficient weight and respect to these beliefs.²³⁰ Thus, these courts denied the citizens affected by the *Buono* litigation the benefit of a well-thought-out decision, reaffirming the Ninth Circuit's reputation of hostility towards religion.²³¹

2. *The Ninth Circuit Should Have Given the Pre-Litigation History of the Cross More Weight*

The Supreme Court and at least one lower federal court identified another contextual consideration when determining the constitutionality of a religious symbol on public land: the history behind the particular religious monument or symbol itself. For example, the *Lynch* court cited the fact that the crèche at issue had caused no political dissention in its forty year history prior to the litigation as evidence that no "excessive entanglement" with religion existed.²³² The Fifth Circuit stated that lack of evidence of a city's improper purpose in adopting an insignia and the "long and unchallenged use" of that insignia are reasons to deny allegations of an Establishment Clause violation.²³³ Additionally, Justice Breyer noted in his concurrence in *Van Orden* that the amount of time a religious symbol remains unchallenged by the public is in itself indicative of its constitutionality.²³⁴

In the *Buono* litigation, private citizens erected the cross at issue in 1934; it faced its first legal challenge in 1999.²³⁵ Thus, the

229. The author believes that each of the four courts dealing with the *Buono* litigation had the responsibility to consider the Establishment Clause issue diligently, regardless of its standard of review.

230. See Vicario, *supra* note 201, at 188 ("When the *Books* court determined that the Ten Commandments Monument was unconstitutional, the court was not determining whether reasonable objective viewers would understand the display to be an endorsement of religion but allowing hostility toward religion because the majority of Elkhart citizens did not want to remove the display of the Ten Commandments Monument from the lawn of the city's Municipal Building.").

231. See, e.g., Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 617 (2003) (describing the Ninth Circuit as "no friend to religion in the public sphere").

232. *Lynch v. Donnelly*, 465 U.S. 668, 684–85 (1984). See also *id.* at 693 (O'Connor, J., concurring).

233. *Murray v. City of Austin*, 947 F.2d 147, 158 (5th Cir. 1991).

234. *Van Orden v. Perry*, 545 U.S. 677, 702–03 (2005) (Breyer, J., concurring). Although the decisions in *Van Orden* and *McCreary* came after the first two *Buono* decisions, their focus on context existed in case law prior to *Buono I*, in *Lynch*, *Allegheny*, and several federal cases.

235. *Buono v. Norton*, 212 F. Supp. 2d 1202, 1205 (C.D. Cal. 2002). Indeed, in contrast to cases such as *Lynch* and *McCreary*, the government played no part in the inception or placement of the religious symbol on public land. See *Lynch*, 465 U.S. at 671 ("Each year, in cooperation with the downtown retail merchants' association, the City of Pawtucket, Rhode

cross experienced a “calm history”²³⁶ for over sixty years before any challenge to its constitutionality was made. Under O’Connor’s endorsement test adopted by the Court in *Allegheny*, how a reasonable observer perceives the symbol indicates the effect of such a display.²³⁷ The lack of challenge to the *Buono* display for so many years indicates that an average observer probably did not, and would not, view the cross to be constitutionally offensive.²³⁸ Such a lack of a challenge distinguishes the *Buono* cross from the cross at issue in *City of Eugene*, the case that controlled the outcome of the *Buono* Establishment Clause issue.²³⁹ There, the cross’ presence resulted in almost immediate litigation.²⁴⁰

Further, under Supreme Court precedent, how a reasonable observer perceives the display is important in determining its effect.²⁴¹ The Supreme Court stated that a reasonable observer is “aware of the history and context of the community and forum in which the religious display appears.”²⁴² Therefore, a reasonable observer of the *Buono* cross would know that private parties, not the government, established the Preserve cross,²⁴³ decreasing an appearance of impropriety. Additionally, a reasonable observer would know that the cross’ purpose was to memorialize war veterans, not promote religion.²⁴⁴ Thus, such a reasonable observer would likely find no government endorsement of religion.

Moreover, “sectarian symbols that have become linked to independent historical events may survive an Establishment Clause attack.”²⁴⁵ Although not a single, isolated historical event, private citizens’ use of the cross as a tribute to war veterans—a use that

Island, erects a Christmas display as part of its observance of the Christmas holiday season.”); *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 850 (2005) (“Executives of two counties posted a version of the Ten Commandments on the walls of their courthouses.”).

236. *Lynch*, 465 U.S. at 684 (majority opinion).

237. *Id.* at 692 (O’Connor, J., concurring); *County of Allegheny v. ACLU*, 492 U.S. 573, 595 (1989).

238. *See, e.g., Van Orden*, 545 U.S. at 702–03 (Breyer, J., concurring).

239. *See, e.g., Buono v. Norton*, 371 F.3d 543, 548 (9th Cir. 2004).

240. *Separation of Church and State Comm. v. City of Eugene*, 93 F.3d 617, 618 (9th Cir. 1996).

241. *See, e.g., Lynch*, 465 U.S. at 692 (O’Connor, J., concurring).

242. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1989); *accord McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862 (2005).

243. *Buono*, 212 F. Supp. 2d at 1205.

244. *Id.*

245. Jason Marques, *To Bear a Cross: The Establishment Clause, Historic Preservation, and Eminent Domain Intersect at the Mt. Soledad Veterans Memorial*, 59 FLA. L. REV. 829, 857 (2007).

occurred over a span of sixty-five years—²⁴⁶ supports a finding that the cross had independent secular significance. A sign accompanying the cross, which existed for many years and identified the symbol as a memorial to veterans, further emphasized the cross' independent significance and informed a reasonable observer of its non-religious purpose.²⁴⁷ The Supreme Court has stated, “[w]hile no sign can disclaim an overwhelming message of endorsement, an ‘explanatory plaque’ may confirm that, in particular contexts, the government’s association with a religious symbol does not represent the government’s sponsorship of religious beliefs.”²⁴⁸ Further, the concurrence in *City of Eugene* noted that designating a symbol as a war memorial could affect a reasonable observer’s interpretation of the government’s purpose.²⁴⁹ Thus, the Ninth Circuit should have considered the constitutional effect of the plaque, now removed, that identified the *Buono* cross as a memorial to veterans.²⁵⁰

Additionally, the Ninth Circuit was not limited in fashioning a tailored remedy for the cross’ perceived impermissible religious effect. As the *McCreary* Court recognized by contrasting the Court’s own replica of the Ten Commandments to the *McCreary* County replica, the difference between a constitutional and unconstitutional display of the same monument can simply be a matter of *how* the monument is displayed, including what surrounds the monument.²⁵¹ The replacement of a prominent sign identifying the purpose of the cross²⁵² or the addition of other monuments around it identifying the area as a memorial to veterans could have offset a seemingly religious message.²⁵³ The *Buono I* court was the court best positioned to consider these alternatives, as the government had yet to engage in extensive efforts to protect the cross and thus remove its appearance of

246. *Buono*, 212 F. Supp. 2d at 1205.

247. *Id.*

248. *County of Allegheny v. ACLU*, 492 U.S. 573, 619 (1989).

249. *Separation of Church and State Comm. v. City of Eugene*, 93 F.3d 617, 625 (9th Cir. 1996) (O’Scannlain, J., concurring).

250. *See infra* notes 251 and 252.

251. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 874 (2005). Although *McCreary* was an antecedent to the first two *Buono* cases, the concept of an “explanatory plaque” being used to clarify the source of a particular symbol has existed since *Allegheny*. *See supra* notes 240–244 and accompanying text.

252. For example, the *Allegheny* Court found a sign next to the challenged menorah to be persuasive evidence of constitutionality. *Allegheny*, 492 U.S. 573, 616.

253. For example, in *Van Orden*, the fact that the Ten Commandments sat among other secular monuments highlighted the Ten Commandments’ secular importance. *Van Orden v. Perry*, 545 U.S. 677, 691–92 (2005).

impartiality.²⁵⁴ However, this court failed to consider any viable ways to ensure the cross' constitutionality, including recent legislation designating the cross a war memorial.²⁵⁵ Instead, it unwaveringly concluded that the cross' presence was unconstitutional, relegating discussion of the war memorial designation to a footnote.²⁵⁶ Such a conclusory opinion may have fueled the flames, causing angry supporters of the cross to undertake extensive efforts to maintain it.²⁵⁷

3. *The Precedent on Which the Buono Courts Relied Was Flawed, Creating Precedent That Permits the Ninth Circuit to Overlook Context*

In adjudicating the original issue of the presence of a religious symbol on public land, the *Buono* courts relied heavily on *City of Eugene*.²⁵⁸ However, that precedent also failed adequately to consider the importance of context in Establishment Clause issues. There, the court concluded that, because a Latin cross is a symbol of Christianity, it was likely that a reasonable observer would perceive the cross as government endorsement of religion.²⁵⁹ However, the court did not consider the symbol's history, its location, or the manner of its display.²⁶⁰ In so doing, it established precedent enabling future courts to overlook the importance of contextual factors in Establishment Clause cases. Indeed, the concurrence in *City of Eugene* condemned the majority's cursory examination of the issue and stated that the people of Eugene were owed a "better explanation" of the extensive litigation behind the cross.²⁶¹ As Judge O'Scannlain noted, the history of a monument as a war memorial, a plaque identifying the monument as such, and the isolated location of a monument were all issues that were overlooked by the majority.²⁶²

254. In contrast, it was McCreary County's repeated efforts to "save" its Ten Commandments monuments that led the Court to conclude that it could not have a secular purpose. *See McCreary*, 545 U.S. at 872.

255. Pub. L. No. 107-117 § 8137, 115 Stat. 2278-79 (2002), *codified at* 16 U.S.C. §410aaa-56.

256. *Buono v. Norton*, 212 F. Supp. 2d 1202, 1215 n.8, 1217 (C.D. Cal. 2002).

257. Indeed, "[t]he [National Park Service] was informed during contacts with local citizens that immediately removing the cross could lead to significant public opposition. The NPS had encountered considerable public opposition to earlier decisions to remove privately-owned items interfering with its management of the Preserve." *Id.* at 1206.

258. *Id.* at 1215-17; *Buono v. Norton*, 371 F.3d 543, 548 (2004).

259. *Separation of Church and State Comm. v. City of Eugene*, 93 F.3d 617, 619 (9th Cir. 1996).

260. *See supra* Part II.A.

261. *City of Eugene*, 93 F.3d at 620 (O'Scannlain, J., concurring).

262. *Id.* at 624-26.

It may be that, as Judge O'Scannlain ultimately concluded in *City of Eugene*,²⁶³ the presence of the *Buono* cross on federal land violated the Establishment Clause, giving the impression of governmental endorsement of religion. However, the Ninth Circuit, a circuit renowned for its liberal opinions,²⁶⁴ condemned the cross too quickly.²⁶⁵ The Supreme Court cautions against evincing hostility towards religion.²⁶⁶ One may speculate that the outcome of the original case might have been different had the court truly considered the importance of context properly. It is further possible that the defendants would not have gone to such great lengths to preserve the cross at all had they felt that the court gave a legitimate and sound reason for rejecting their claims. Therefore, the Ninth Circuit should have avoided acting hastily, instead weighing both arguments more evenly.

B. Once the Validity of the Land Transfer Became the Issue, the Ninth Circuit Engaged in Proper Disposition of the Case by Correctly Applying the Unusual Circumstances Test

Whether the Ninth Circuit correctly dealt with the issue of whether the presence of the cross on federal land violated the Establishment Clause is a close question, one to which the Ninth Circuit did not give enough consideration.²⁶⁷ However, the issue changed once the government made the decision to sell the challenged land to a private party,²⁶⁸ and the Ninth Circuit properly found the sale to be unconstitutional.²⁶⁹

Case law indicates that land transfers used to avoid Establishment Clause violations are presumptively constitutionally valid.²⁷⁰ Indeed, "absent unusual circumstances," government bodies accused of impermissibly endorsing a religious message may dispose of a challenged religious symbol, and the land on which it sits, through

263. *Id.* at 626.

264. See Tara Dahl, *Surveys in America's Classrooms: How Much Do Parents Really Know?*, 37 J.L. & EDUC. 143, 183 n.306 (2008) (describing the Ninth Circuit as "the most notoriously liberal and most overruled circuit in the nation") (citing Chisun Lee, *Political Prisoners*, VILLAGE VOICE, Oct. 19, 2004, at 27).

265. See *supra* notes 210–12 and accompanying text.

266. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

267. See *supra* Part IV.A.

268. Pub.L. No. 108-87, 117 Stat. 1054 (2003).

269. *Buono v. Kempthorne*, 502 F.3d 1069, 1082–86 (9th Cir. 2007).

270. See *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 705 (7th Cir. 2005); *Chambers v. City of Frederick*, 373 F. Supp. 2d 567 (D. Md. 2005).

a land transfer.²⁷¹ However, a sale to a straw purchaser that leaves real control in the hands of the government seller is an unusual circumstance that equates to an Establishment Clause violation.²⁷²

Although the transferred land was in an isolated location, weighing in favor of constitutionality,²⁷³ the history of the legislation behind the land transfer weighed heavily against it.²⁷⁴ As the facts of the *Buono* case evidence, the government willingly entered into precarious Establishment Clause waters in order to preserve the cross, destroying any appearance of its impartiality.²⁷⁵ A reversionary clause within the Department of Defense Appropriations Act of 2004, identifying the cross as a war memorial, left open the possibility that the government could regain control of the symbol in the future.²⁷⁶ Further, the Emergency Supplemental Appropriations Act, which reaffirmed the Secretary of Interior's duty to maintain the cross even after the land transfer, was evidence that the sale was to a straw purchaser.²⁷⁷ Lastly, the government bypassed its normal administrative procedure in selling public land to private purchasers, indicating a vested interest in selection of an "appropriate" purchaser.²⁷⁸ Indeed, by the time of *Buono IV*, the very history of the cross was evidence of "unusual circumstances."²⁷⁹ Therefore, in contrast to *Chambers v. City of Frederick*,²⁸⁰ it is clear that a reasonable observer, knowledgeable about the legislation and litigation behind the *Buono* cross, would determine that the government was attempting to endorse a religious message through the land sale.²⁸¹

V. CONCLUSION

In *Buono v. Kempthorne*, the Ninth Circuit held that a government-ordered land transfer of a piece of land within the Mojave

271. *Mercier*, 395 F.3d at 700.

272. *Id.* at 702.

273. *Id.* at 703.

274. *Buono v. Kempthorne*, 502 F.3d 1069, 1082–86 (9th Cir. 2007).

275. *Id.*

276. *Buono v. Norton*, 364 F. Supp. 2d 1175, 1180 (C.D. Cal. 2005).

277. *Id.*

278. *Id.* at 1181. Nonetheless, the *Buono III* and *Buono IV* courts gave too much weight to the fact that the government sold the land to the Veterans of Foreign Wars Post, who had a history with the cross. *Id.* at 1180; *Kempthorne*, 502 F.3d at 1084. As the *Mercier* court noted, it makes "practical sense" to sell the land to a party with a history with the religious symbol. *Mercier*, 395 F.3d at 703.

279. *Buono*, 502 F.3d at 1085.

280. *Chambers v. City of Frederick*, 373 F. Supp. 2d 567, 573 (D. Md. 2005).

281. *Buono*, 502 F.3d at 1086.

National Preserve to a private party violated a district court's permanent injunction against the display of a religious symbol, a Latin cross, on that land.²⁸² While the court was correct in determining that the circumstances surrounding the land exchange indicated that the transfer was actually a conveyance to a straw purchaser,²⁸³ the court nonetheless gave insufficient consideration to Supreme Court precedent requiring that a court consider the context of a religious symbol on public property before conclusively adjudicating an Establishment Clause case.²⁸⁴ Indeed, the *Buono* courts should have considered factors such as the history of the cross, its location, and the manner in which it was displayed before reaching its ultimate conclusion.²⁸⁵ The Ninth Circuit's known bias against conservatively-motivated parties²⁸⁶ may have worked against it in the case at bar. It is possible that it could have avoided extensive litigation had it simply been open to considering the merits of the case for constitutionality or reasonable methods of altering the symbol and its surroundings to ensure its constitutionality.²⁸⁷

282. *Id.* at 1071.

283. *See supra* Part IV.B.

284. *See supra* Part IV.A.

285. *Id.*

286. *See, e.g.*, DeForrest, *supra* note 231, at 617.

287. *See supra* Part IV.A.