

No. 05-55852

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK BUONO,

Plaintiff-Appellee,

v.

GAIL NORTON, Secretary of the Interior, *et al.*,

Defendants-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

BRIEF AMICUS CURIAE OF THE NATIONAL LEGAL FOUNDATION,
in support of the *Appellants*
urging reversal

Steven W. Fitschen
Counsel of Record for *Amicus Curiae*
Colleen M. Holmes
The National Legal Foundation
2224 Virginia Beach Blvd., Suite 204
Virginia Beach, VA 23454
(757) 463-6133

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae*, the National Legal Foundation certifies that it has no parent company, subsidiary, or affiliate that has issued shares to the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

ARGUMENT 1

I. TRANSFERRING THE LAND TO A PRIVATE ORGANIZATION IS A VALID WAY TO END ANY PERCEIVED GOVERNMENT ENDORSEMENT OF RELIGION AND IS NOT MERELY AN ATTEMPT TO CIRCUMVENT THE INJUNCTION BECAUSE SUCH TRANSFERS ARE CONSTITUTIONAL ABSENT “UNUSUAL CIRCUMSTANCES,” NONE OF WHICH EXIST HERE..... 2

A. The Reversionary Clause and Funds Appropriated to Install Replicas of the Original Cross and Plaque Do Not Render the VFW a Straw Purchaser Because the Government Will Not Exercise the Traditional Duties of Ownership...... 3

B. The Method of Sale Was Valid Because it Complied with Applicable Law. 7

C. The Method of Sale Was Valid Because it Complied with Applicable Law. 9

D. The Alleged “Herculean Efforts” of the Government to Preserve the Cross Are Not “Unusual Circumstances” Because They are Intended Only to End Any Perceived Endorsement of Religion. 10

CONCLUSION 12

CERTIFICIATE OF SERVICE 13

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Buono v. Norton</i> , 364 F. Supp. 2d 1175 (C.D. Cal. 2005).....	2, 3, 6, 8, 10
<i>Buono v. Norton</i> , 212 F. Supp. 2d 1202 (C.D. Cal. 2002).....	6, 8
<i>Chambers v. City of Frederick</i> , 373 F. Supp. 2d (D. Md. 2005).....	7
<i>Freedom from Religion Found., Inc. v. City of Marshfield</i> , 203 F.3d 487 (7th Cir. 2000)	2, 3, 5, 8, 11
<i>Mercier v. Fraternal Order of Eagles</i> , 395 F.3d 693 (7th Cir. 2005)	2, 4, 7-9, 11
<i>Paulson v. City of San Diego</i> , 262 F.3d 885 (9th Cir. 2001).....	4
<i>Paulson v. City of San Diego</i> , 294 F.3d 1124 (9th Cir. 2002).....	4
Other Authorities	
Mojave National Reserve: Administrative History (Chapter 6), http://www.nps.gov/moja/adminhist /adhi6.htm (last visited Nov. 14, 2005)	9, 11, 12
Pub. L. No. 107-117, 115 Stat. 2230 (2002).....	6
Pub. L. No. 108-87, 117 Stat. 1054 (2003).....	5
U.S. Const. Art. IV § 3.....	9

INTEREST OF *AMICUS CURIAE*

Amicus Curiae, The National Legal Foundation (NLF) is a 501c(3) public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. Since its founding in 1985, the NLF has litigated important First Amendment cases in both the federal and state courts.

The NLF has gained valuable expertise in the area of First Amendment law, which it believes will assist this Court in deciding this appeal. The NLF has an interest, on behalf of its constituents and supporters, in seeing that the public square, including America's public parks, is not stripped of every vestige of our religious heritage. In the present case, *Amicus* and its constituents believe that the cross at issue is a valid war memorial and that the fact that it is also a religious symbol does not render it constitutionally problematic.

This brief is filed pursuant to the consent of counsel of record for both parties.

ARGUMENT

Multiple issues are before this Court in the present case. However, this brief

will focus exclusively on the issues pertaining to the proposed land transfer itself, and will demonstrate that the District Court erred in ruling that the proposed transfer is nothing more than a way for the government to prevent removal of the cross while avoiding the injunction.

I. TRANSFERRING THE LAND TO A PRIVATE ORGANIZATION IS A VALID WAY TO END ANY PERCEIVED GOVERNMENT ENDORSEMENT OF RELIGION AND IS NOT MERELY AN ATTEMPT TO CIRCUMVENT THE INJUNCTION BECAUSE SUCH TRANSFERS ARE CONSTITUTIONAL ABSENT “UNUSUAL CIRCUMSTANCES,” NONE OF WHICH EXIST HERE.

The District Court engaged in the “unusual circumstances” analysis set forth in *Freedom from Religion Foundation, Inc. v. City of Marshfield*, 203 F.3d 487, 491-92 (7th Cir. 2000), to determine whether a proposed transfer of the government owned land under the cross on Sunrise Rock to the local Veterans of Foreign Wars chapter (hereinafter, “VFW”) in exchange for a privately owned parcel located elsewhere within the national park evinced any unusual circumstances that would invalidate the sale. *Buono v. Norton*, 364 F. Supp. 2d 1175, 1178 (C.D. Cal. 2005).

Other courts employing the *Marshfield* test have held that unusual circumstances include a sale to a straw purchaser whereby the government actually exercises the traditional duties of ownership; a sale that does not comply with applicable law; or a sale well below fair market value that constitutes a gift to a religious organization. *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 702

(7th Cir. 2005) (citing *Marshfield*, 203 F.3d at 492). The Seventh Circuit has held that it is not necessary that each of these conditions be satisfied, and other matters may be considered since courts look at the details of each individual transaction “to determine if government action endorsing religion has actually ceased.”

Marshfield, 203 F.3d at 491.

A. The Reversionary Clause and Funds Appropriated to Install Replicas of the Original Cross and Plaque Do Not Render the VFW a Straw Purchaser Because the Government Will Not Exercise the Traditional Duties of Ownership.

The District Court erred when it held that the government’s reversionary rights in the property, and the fact that the government has a continuing obligation to maintain the cross, indicates that the VFW is merely a “straw purchaser.”

Buono, 364 F. Supp. 2d at 1181. While the purchase contract contains a clause requiring the VFW to maintain the area as a War World I memorial or risk a reversion to the government, similar requirements have been upheld in other transfers. In *Marshfield*, city land was transferred to a private organization to remedy an Establishment Clause violation because the land contained a religious display. The court held that a restrictive covenant in the deed limiting the use of the property to public park purposes did not affect the validity of the transfer. 203 F.3d 487, 492-93 (7th Cir. 2000). There, the city had not made any effort to enforce the covenant, and even if it had, such enforcement would relate to the parties’ conduct following the land transfer, and the Seventh Circuit refused to

consider whether such action would be an endorsement of religion in violation of the Establishment Clause. *Id.* In *Mercier*, the Seventh Circuit re-affirmed the *Marshfield* holding that a restriction in a deed reaffirming the property's use as an historical landmark did not invalidate the transfer from government to private ownership. 395 F.3d 693 at 704-05.

Similarly, Judge Fernandez of this Court, joined by three other judges, argued in his dissent to *Paulson v. City of San Diego*, 294 F.3d 1124 (9th Cir. 2002) (*en banc*) that government contract action restricting the use of property to its historical function as a war memorial when transferring the property to a private owner did not conflict with the Establishment Clause. 294 F.3d at 1134. This view gives important guidance to this Court since the majority of the *Paulson en banc* Court based its decision on the California Constitution and expressed no opinion, *i.e.*, did not disagree with the four judges on the federal constitutional question. *Id.* at 1133 n.7. (Furthermore, the unanimous *Paulson* panel decision, *Paulson v. City of San Diego*, 262 F.3d 885 (9th Cir. 2001), also held that the sale did not violate the federal Establishment Clause. While one member of the panel was a senior judge from the Fifth Circuit, sitting by designation; Judges Hug and Tallman bring the number of judges from this Court who have found the *Paulson* land transfer constitutional under the federal constitution to six.)

The government's requirements in *Mercier* and *Paulson* are the same as the

requirement in the instant case, in that the government is seeking to maintain the purpose for which the memorial has been established, to honor World War I veterans. In fact, the government's restriction in the case at bar does not protect the religious aspect of the memorial.¹ For example, the restriction does not prevent the VFW from removing the cross. It only protects the secular aspect of the memorial, requiring that the land be maintained as a WWI memorial. The reversionary clause states that

the conveyance under subsection (a) shall be subject to the condition that the recipient maintain the conveyed property as a memorial commemorating United States participation in World War I and honoring the American veterans of that war. If the Secretary determines that the conveyed property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States.

Pub. L. No. 108-87, 117 Stat. 1054 (2003). Like those in the above mentioned cases, this restriction is appropriate for historical reasons.

The reversion in the land transfer to VFW, like the restrictive covenant in *Marshfield* and the restriction in *Paulson*, should not affect the validity of the land transfer. The transfer is not yet complete, thus, the government has not yet attempted to enforce the reversionary rights. Since the reversion clause applies to the parties' actions once the transfer has been completed, the District Court erred

¹ However, *Amicus* believes that even if it did protect the religious aspect of the memorial, that fact would not render the transfer unconstitutional. Since that is not the case, *Amicus* will not encumber this brief with a counter-factual argument.

when it considered the reversion in its determination of whether the transfer, itself, is valid and constitutional. *Marshfield*, 203 F.3d at 492-93.

The District Court also erred when it inferred that the government had an “easement or license” in the property because it retains a right of access. *Buono*, 364 F. Supp. 2d at 1180. The right of access to which the District Court refers is derived from § 8137 of the Supplemental Appropriations for Recovery From and Response to Terrorists Attacks on the United States Act of 2002 (Pub. L. No. 107-117, 115 Stat. 2230 (2002)), which designated the property as a national World War I monument and appropriated up to \$10,000 for the creation and installation of replicas of the original cross and plaque. *Buono*, 364 F. Supp. 2d at 1180. The language of § 8121 simply requires Secretary Norton to continue to carry out her duties under § 8137. *Id.* at 1180. This is not a right of ownership nor an easement that carries constitutional significance. It is merely a provision enabling the government to follow through on commitments made prior to the land transfer agreement. This provision is also necessary because the land transfer could take an additional six months to two years (from the time of the district court proceeding). *Buono*, 364 F. Supp. 2d at 1178. The installation of the replicas might be finished either prior to or after the transfer is complete. The right of access is merely a logistical necessity. It is not emblematic of ownership.

Other than the installation of the replicas of the original cross and plaque,

the VFW will assume the traditional duties of ownership once the transfer is complete. The cross on Sunrise Rock has always been privately maintained, *Buono v. Norton*, 212 F. Supp. 2d 1202, 1206 (C.D. Cal. 2002), and there is no indication that the government will have any further responsibility for the site after it carries out its responsibilities under the Supplemental Appropriations Act. Government cessation of, and private assumption of, maintenance have been significant factors in other cases in which such transfers have been challenged. For example, a court ruled in *Chambers v. City of Frederick*, 373 F. Supp. 2d 567, 572 (D. Md. 2005) that a transfer similar to the one involved in the present case was constitutional, partly because the buyers assumed the traditional duties of ownership. *Accord, Mercier*, 395 F.3d at 702.

In this case, the VFW will assume all traditional duties of ownership for the property on Sunrise Rock. The government's pre-existing obligation to provide replicas of the original cross and plaque are not traditional duties of ownership and do nothing to negate the validity of the transfer.

B. The Method of Sale Was Valid Because it Complied with Applicable Law.

Courts have consistently held that the exclusion of other bidders and acceptance of low bids have not invalidated land transfers where the transferee has a history with the property that makes it the logical new owner. In *Chambers*, 373 F. Supp. 2d at 572, the sale of property to the Fraternal Order of Eagles

(hereinafter 'FOE') for a lower price than those offered by other bidders was not held to be an unusual circumstance that would invalidate the sale. The FOE was found to be the logical recipient because it had originally donated the monument to the city and was therefore deemed best equipped to maintain the property. *Id.*

Similarly, in *Mercier*, 395 F.3d at 703, the court reasoned that offering the property only to the FOE instead of removing the monument made practical sense because the FOE had donated the monument to the city in the first place, and had maintained and would continue to maintain the property because of their historic connection to it. And in *Marshfield*, the court held that the sale of property to the FOE at the exclusion of other bidders did not invalidate the sale. *Marshfield*, 203 F.3d at 492.

The instant case is no different from those just described. Here, the VFW erected the first cross and plaque on Sunrise Rock in 1934 as a WWI memorial. They have maintained and even replaced the cross as needed since that time. *Buono*, 212 F. Supp. 2d at 1206.

The District Court noted suspicion about the fact that the transfer was not executed through traditional channels, but was instead "buried" in an Appropriations Bill and declared "[w]hile not dispositive by itself, this unusual circumstance adds support to Plaintiffs contention that the government is seeking to evade this court's injunction with the land transfer." *Buono*, 364 F. Supp. 2d at

1181. The District Court's concern about the transaction is unfounded.

Effectuating the transfer in a defense appropriations bill instead of normal Interior Department procedures was not an unusual circumstance that would render the transfer invalid. The transfer complied with applicable law—the United States Constitution's grant of authority to Congress to dispose of federal land. U.S. Const. Art. IV § 3. The government could have transferred the land through normal Interior Department procedures, but the will of the constituents of the area pre-empted such procedures. United States Representative Jerry Lewis, in response to a "furious reaction" by area residents, initiated the various actions recounted by the District court, including pushing through Congress the bill that made the cross a national war memorial and helping to get the transfer into the Defense Appropriations Bill. Mojave National Reserve: Administrative History (Chapter 6), <http://www.nps.gov/moja/adminhist/adhi6.htm> (last visited Nov. 14, 2005).

The transfer of land in this case, while perhaps unorthodox, complied with applicable law and did not constitute an unusual circumstance that would invalidate the transfer. In fact, the *Mercier* court specifically emphasized that features of a land transfer "may be unique . . . [yet] not entail the 'unusual circumstances' that would otherwise override the type of legitimate sale approved by *Marshfield*. 395 F.3d at 703.

C. The Proposed Transfer Will Be at Fair Market Value Because Congress has so Specified.

The last consideration typically examined in land transfer cases is easily satisfied in the instant case. The transfer of land for land was not equivalent to a sale well below fair market value. Therefore it did not result in a gift to a religious (or any other) organization. In the instant case, the District Court correctly acknowledged that fair market value will be paid for the property because of a cash equalization clause in the bill that authorized the transfer. *Buono*, 364 F. Supp. 2d at 1179 n.5.

D. The Alleged ‘Herculean Efforts’ of the Government to Preserve the Cross Are Not ‘Unusual Circumstances’ Because They are Intended Only to End Any Perceived Endorsement of Religion.

In addition to the three categories of unusual circumstances established by the Seventh Circuit, the District Court examined what it referred to as the ‘Herculean efforts’ of the government to preserve the Latin cross. *Id.* at 1182. The District Court declared that these efforts, which included designating the cross a national war monument, prohibiting the use of federal funds to dismantle the cross or any World War I memorial, appropriating \$10,000 for replicas of the original cross and plaque, and transferring the land to the VFW. *Id.* at 1181-82. However, the government’s actions were only intended to cure any Establishment Clause violations while respecting the good intentions of those who erected and have maintained the cross and the historical benefit of the cross as a WWI

monument. In upholding a similar land transfer for similar reasons in *Mercier*, the Seventh Circuit described the constitutional expedience of such a transfer: “While the historical benefit would remain, the sale would extricate the City from any perceived endorsement of the religious wording on the Monument.” *Mercier*, 395 F.3d at 702.

The VFW erected the cross at issue in 1934 to honor World War I veterans, and they and others have maintained it ever since. Mojave National Reserve: Administrative History (Chapter 6), <http://www.nps.gov/moja/adminhist/adhi6.htm> (last visited Nov. 14, 2005). It is illogical and dishonoring for the government to dismantle a monument erected by a private organization when courts have upheld a more respectable solution by allowing the government to transfer land to private organizations to alleviate Establishment Clause violations while preserving the purpose of the monuments.

The Seventh Circuit has stated that while removal of religious displays is an option for ending any perceived endorsement of religion, it is not necessary when other alternatives are available. *Mercier*, 395 F.3d at 702; *Marshfield*, 203 F.3d at 497. When analyzing whether transfers of land are a viable alternative, the Seventh Circuit has looked to the history of the display at issue. “The purpose for which the Monument has remained in the Park for forty years is important in understanding why the City would choose to keep it where it was rather than allow

it to be removed.” *Mercier*, 395 F.3d at 704. The cross on Sunrise Rock has served as a memorial for those who served our country during WWI. The cross has mattered enough to local residents that they repeatedly repaired and reconstructed it while the land under the cross was in private hands. Mojave National Reserve: Administrative History (Chapter 6), <http://www.nps.gov/moja/adminhist/adhi6.htm> (last visited Nov. 14, 2005). In transferring the land, instead of removing the cross, the government is honoring the veterans of WWI and respecting the history of the cross in the area.

CONCLUSION

For the foregoing reasons and for other reasons stated in the Appellants’ brief, this Court should reverse the decision of the District Court.

Respectfully submitted
this fourteenth day of November, 2005

Steven W. Fitschen
Counsel of Record for *Amicus Curiae*
The National Legal Foundation
2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, VA 23454
(757) 463-6133

CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of the National Legal Foundation in the case of *Buono v. Norton et al.*, No. 05-55852, on all required parties by depositing the required number of paper copies in the United States mail, first class postage, prepaid on November 14, 2005, addressed as listed below. The required number of paper copies were filed in the same manner on the same date.

Peter J. Eliasberg, Esq.
ACLU Foundation of Southern California
1616 Beverly Blvd.
Los Angeles, CA 90026
Phone: (213) 977-9500
Attorney for Buono, Plaintiff-Appellee

Kathryn E. Kovacs, Esq.
U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 23795
Washington, D.C. 20026-3795
Phone: (202) 514-4010
Attorney for Gail Norton, *et al.*, Defendants-Appellants

Steven W. Fitschen
Counsel of Record for Amicus Curiae
The National Legal Foundation
2224 Virginia Beach Blvd., Suite. 204
Virginia Beach, VA 23454
(757) 463-6133