

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: KEN L. SALAZAR, SECRETARY OF THE INTERIOR,
ET AL., Petitioners, v. FRANK BUONO.
CASE NO: No. 08-472
PLACE: Washington, D.C.
DATE: Wednesday, October 7, 2009
PAGES: 1-59

ALDERSON REPORTING COMPANY
1155 CONNECTICUT AVE., NW
WASHINGTON, D.C. 20036
(202) 289-2260

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P R O C E E D I N G S

(10:04 a.m.)

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

ORAL ARGUMENT OF GEN. ELENA KAGAN
ON BEHALF OF THE PETITIONERS

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

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

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

Or, second, Congress --

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

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

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

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

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

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

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

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

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

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

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

15 GENERAL KAGAN: The --

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

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

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

1 thought that to get national memorial status, the
2 government has to approve what you put up.

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

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

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

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

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

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

10 JUSTICE SCALIA: Right.

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

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

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

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

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

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

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

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

16 So that the message --

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

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

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

12 MS. KAGAN: But --

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

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

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

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

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

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

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

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

12 JUSTICE BREYER: No, I'm talking about the
13 first. We are talking about the first injunction. The
14 first injunction says that the government may not permit
15 display. You've covered it up, so you are not
16 permitting display. You are in compliance.

17 GENERAL KAGAN: That is correct. Yes.

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

25 GENERAL KAGAN: Justice Breyer, again, the --

1 the Respondents had to go back to the district court in
2 order not just to enforce the injunction, which said
3 don't display the statue, but to get additional relief,
4 which was don't transfer the statue. If the transfer
5 had taken place, it would no longer have been the
6 government's property, the government would not have
7 permitted or not permitted the display because it wasn't
8 the government's property to permit or not to permit the
9 display.

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

16 GENERAL KAGAN: And -- and the Ninth Circuit
17 specifically said --

18 JUSTICE STEVENS: But, General Kagan --

19 GENERAL KAGAN: When this came to the Ninth
20 Circuit, the Ninth Circuit was asked by the Respondents --
21 in order to rule on the transfer legislation, the Ninth
22 Circuit specifically said: We are not going to do that;
23 that's a decision for another day, a separate decision.
24 Because of that, the Respondents had to go back to the
25 district court and had to get the district court

1 essentially to modify the injunction and to provided
2 additional relief.

3 Now, there is some question as to whether
4 the standing question here, just the standing question
5 is precluded, and our view is that it is not precluded,
6 because whether this -- the way the government views this
7 is it's one entire litigation in which all issues are
8 open.

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

19 GENERAL KAGAN: Well, either this is one
20 litigation, in which case all issues are before the Court,
21 or it's too entirely separate litigations, in which case
22 the Court has an obligation to independently consider
23 the standing question.

24 JUSTICE GINSBURG: Well, we know it isn't
25 that because, as I think you pointed out, the same

1 docket number. This wasn't a new complaint. This was a
2 motion to enforce the judgment.

3 GENERAL KAGAN: But it couldn't have been a
4 motion to enforce the judgment because the government
5 was in compliance with the judgment and because the
6 Ninth Circuit had said that the question that
7 Respondents were raising was an entirely separate issue
8 for another day, according to the Ninth Circuit.

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

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

24 GENERAL KAGAN: Mr. Chief Justice, we could
25 not have taken the standing question to this Court in

1 the -- in the procedural posture that the case was at, at
2 that point. It would have been really an irresponsible
3 action on our part to ask this Court to address the
4 standing issue after the first court of appeals' judgment
5 where -- where we knew that we were going to relitigate
6 the question of the validity of the transfer. We couldn't
7 have come to you, we wouldn't have come to you, as the
8 Solicitor General's Office and asked you to
9 adjudicate a decision that was as likely as not going to
10 be irrelevant.

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

21 GENERAL KAGAN: I think, Justice Sotomayor,
22 you are right that we could have, but I don't think that
23 we would have used our discretion in essentially knocking
24 on this Court's door, the Solicitor General's Office
25 discretion, in order to ask you to decide a question that

1 was as likely or not going to be completely
2 irrelevant depending on what happened with respect to
3 the transfer statute.

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

17 GENERAL KAGAN: Well, Justice Sotomayor, I
18 appreciate the distinction that you are making between
19 the standing question and the merits question, and I
20 think you are exactly right as to that point. But
21 whatever the question as to whether we have given up the
22 standing question, certainly there is no such question
23 on the merits of this -- of the validity of this
24 transfer. But with respect, I think that the standing
25 question is -- is not the way you described it. And

1 it's partly because we couldn't have come to this Court
2 or we wouldn't have come, is a better way to say it. We
3 would have thought that it was not the right kind of
4 position to ask the Court to take certiorari on a
5 question that basically was very likely, we thought,
6 to go away. Now even --

7 JUSTICE KENNEDY: Well, but that --

8 GENERAL KAGAN: -- if we were --

9 JUSTICE KENNEDY: That's because -- that's
10 because you assume the act is going to be valid. You
11 could have come here and said: This is such an important
12 case Congress is taking action, and therefore, you should
13 hear our standing argument to avoid the necessity of the
14 Legislative Branch having to come in. You could have said
15 that.

16 GENERAL KAGAN: Well, but we didn't, because
17 we did think that Congress had acted appropriately and
18 that the congressional act was valid, and continue to do
19 so, continue to think that this --

20 JUSTICE GINSBURG: Yes, but the standing
21 issue was independently important to the government,
22 because the government can face this kind of question
23 again, and if you right -- if you were right on the
24 standing point -- I mean, I don't understand why the
25 government would not have had a strong incentive to say,

1 we want to get rid of these cases on the standing
2 ground, we think the Court was wrong on standing.

3 But in any case, you didn't do that, and I
4 think that you started your argument this morning in the
5 right place when you said, let's talk about this law.
6 Congress said, accepting arguendo that the Court was
7 right, here's a law that cures the constitutional
8 defect. And that's where you were -- that's where you
9 started your argument. Maybe you can pick up with that.
10 But --

11 JUSTICE BREYER: But just I want to just get
12 this clear procedurally. I'm sorry. It'll take one
13 more second.

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

25 GENERAL KAGAN: Justice Breyer --

1 JUSTICE BREYER: -- this violates the
2 injunction as written, and the Ninth Circuit affirmed
3 that.

4 So is there any question in this case of
5 modifying? Is there any question other than the one
6 that I think Justice Scalia was taking a good argument
7 about, whether the proposed statute violates the
8 July 24th injunction? That's what the case is about.
9 Or why am I wrong?

10 GENERAL KAGAN: You are -- you are incorrect,
11 Justice Breyer, because in addition to saying this
12 violates the previously given injunction, the district
13 court said, you are enjoined from transferring this
14 property in accordance with this statute. And so there
15 was additional relief, additional relief that the Ninth
16 Circuit said was additional relief --

17 JUSTICE BREYER: That's true.

18 GENERAL KAGAN: -- so that it wasn't
19 deciding in the first go-round, and that's -- and that
20 places the question, the merits question of the validity
21 of this transfer directly before the Court.

22 JUSTICE BREYER: Thank you.

23 JUSTICE ALITO: Isn't it true, though --

24 CHIEF JUSTICE ROBERTS: Before we get --
25 before your time expires, we would like to spend a

1 couple of minutes on the merits.

2 (Laughter.)

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

8 GENERAL KAGAN: Mr. Chief Justice, there are
9 certainly limits to the way that the government can
10 transfer property, and I would give you a few of them.
11 If -- if it was not a bona fide sale, so that there
12 wasn't proper consideration; if -- if there was only
13 religious purpose, so that there was no secular purpose
14 involved; or if after the sale the property was
15 indistinguishable from government property, so that
16 everybody naturally thought that this was government
17 property. In those cases --

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

20 GENERAL KAGAN: That -- that, in fact, it's
21 not the case here. And it's not the case for two reasons:
22 First, the preserve is riddled with private inholdings.
23 There are 1800 private landowners with -- excuse me, 1,000
24 private landowners with 1800 plots of land, so it's a --

25 JUSTICE STEVENS: But what percentage of the

1 total area do they represent?

2 GENERAL KAGAN: I'm sorry.

3 JUSTICE STEVENS: What percentage of the
4 total area do they represent?

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

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

13 GENERAL KAGAN: I'm sorry.

14 JUSTICE STEVENS: Do you concede that the
15 Establishment Clause was violated at the time this case
16 was decided?

17 GENERAL KAGAN: We do not, Justice Stevens.
18 The government has argued -- argued below that there was
19 no violation prior to the transfer statute, and that
20 remains the government's position, although, as I said
21 to Justice Scalia, we think that that position has been
22 overtaken by events and that the only question before
23 the Court is the transfer statute.

24 I was going to go on to say to the Chief
25 Justice that, in addition to the fact that private

1 inholdings just riddle the preserve, the government is
2 perfectly happy to put up signs which make clear that
3 the -- the plot in question will not in fact be the
4 government's, but will be the VFW's.

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

10 GENERAL KAGAN: I don't think that that is
11 correct, Mr. Chief Justice. I think that the preserve
12 would put up signs for various historic or cultural or
13 otherwise important --

14 CHIEF JUSTICE ROBERTS: But it hasn't done
15 anything like that. It doesn't say for other property
16 owners that have maybe something that -- you know, a
17 ramshackle shack, that they want people to know this
18 isn't the government's property. They don't do anything
19 like that.

20 It's -- under your hypothetical, it would be
21 only religious property that would have these special
22 warning signs.

23 GENERAL KAGAN: Well, I suspect that there
24 are a great many identification signs throughout the
25 preserve, although I don't know precisely what they are.

1 And this would be one of those, saying essentially that
2 there's -- you know, that there is this war memorial, that
3 it was put up by the VFW, that it is maintained and owned
4 by the VFW.

5 JUSTICE GINSBURG: Who would see it, General
6 Kagan? Who would see it? I mean, the Seventh Circuit
7 case, it was -- it was on level ground, lots of people
8 used the area, and I think the Seventh Circuit required
9 a fence and a sign. But here, this cross is high on a
10 cliff in a desolate area. And if you had a little sign,
11 who would be -- you would have to climb up to it.

12 (Laughter.)

13 GENERAL KAGAN: I actually think, Justice
14 Ginsburg, that it would be easy to do. I was out there
15 three or four weeks ago. The superintendent drove me to
16 the site. There is virtually nobody who could see this
17 war memorial in any other way than by going in one of
18 two directions on Cima Road. And you could put signs up
19 on Cima Road that said exactly what you were going to
20 see, you know, in 100 yards or a mile or whatever it
21 was.

22 CHIEF JUSTICE ROBERTS: How is the question
23 of -- I don't want to get into your rebuttal time, but
24 briefly, how is the question of whether signs are or
25 aren't valid or required before us in this case? There

1 are no signs there, and you are asking us to consider
2 whether the statute is valid or not.

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

6 And -- and as I said, there are many, many
7 private holdings within the preserve, people who could put
8 up whatever religious symbols they wanted to. One simply
9 wouldn't know whether it was on private land or on other
10 land. But I will say, in addition to that, that the
11 preserve's superintendent himself would like to put up a
12 sign essentially telling preserve users what the war
13 memorial was and what its provenance was. If --

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

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

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

25 JUSTICE SOTOMAYOR: This would be on

1 government land, that sign? It wouldn't be on the acre
2 that you transferred? I'm a little confused.

3 GENERAL KAGAN: The small plaque --

4 JUSTICE SOTOMAYOR: You are talking about
5 putting --

6 GENERAL KAGAN: The small plaque --

7 JUSTICE SOTOMAYOR: Would go on the cross?

8 GENERAL KAGAN: That's correct.

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

12 GENERAL KAGAN: That's correct. And as I
13 said, it's something that the superintendent would like
14 to do and I think would be consistent with signage in
15 the area. If I --

16 JUSTICE SOTOMAYOR: Did you raise that
17 alternative with the Ninth -- with the district court
18 and the Ninth Circuit?

19 GENERAL KAGAN: I don't believe it ever came
20 up, Justice Sotomayor. We did talk about it in our
21 merits brief to this Court, but I don't think that it
22 ever came up below.

23 If I could reserve the balance of my time,
24 Mr. Chief Justice.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Eliasberg.

2 ORAL ARGUMENT OF PETER J. ELIASBERG

3 ON BEHALF OF THE RESPONDENT

4 MR. ELIASBERG: Mr. Chief Justice, and may
5 it please the Court:

6 Justice Breyer, I would like to direct my
7 beginning remarks to you. I believe you've correctly
8 stated the procedural posture exactly right. The only
9 question -- the point that I would make is that I don't
10 believe we did -- there was a modification of the
11 injunction here. Any time a defendant passes a piece of
12 legislation after an injunction is first entered, there
13 may be a question as to whether that new statute or
14 legislation is consistent with the injunction. But it's
15 not new relief.

16 JUSTICE BREYER: I see what the judge did.
17 He said: The motion to enforce the July 24th injunction
18 is granted. He said: Buono's motion to amend it is
19 denied. Then he did two other things, which he listed
20 some people and he said they are enjoined from
21 implementing the law.

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

25 MR. ELIASBERG: That's exactly correct. That

1 is --

2 CHIEF JUSTICE ROBERTS: So as a result --

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

9 MR. ELIASBERG: I believe that's -- that is
10 here, and that is really the only question that's here.

11 CHIEF JUSTICE ROBERTS: So that under your
12 approach, that this is looking to see if the injunction
13 is being enforced or violated, we would be reviewing an
14 act of Congress under an abuse of discretion standard,
15 not -- not de novo?

16 MR. ELIASBERG: That's correct. But for
17 this, we --

18 CHIEF JUSTICE ROBERTS: Have we ever done
19 that before?

20 MR. ELIASBERG: I'm not --

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

24 MR. ELIASBERG: I am not aware of that, but
25 I am also not aware of a situation where the act of

1 Congress is being put forth as the response to an
2 already adjudicated constitutional violation.

3 JUSTICE GINSBURG: Mr. Eliasberg, I thought
4 that the Ninth Circuit the first time around had taken
5 meticulous care to make certain that the issue of the
6 validity of the statute would not be before the Court in
7 the first round. Judge Kozinski wrote: "We express no
8 view as to whether a transfer completed under Section
9 8121 would pass constitutional muster, but leave this
10 question for another day."

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

12 And then the district judge said: Yes, I
13 recognize the Ninth Circuit didn't touch the validity of
14 that statute, left it for another day.

15 The day has come. So it is for the first time
16 that the Court is deciding the question of whether section
17 8121 passes constitutional muster.

18 MR. ELIASBERG: The only thing I would
19 disagree with you on that point, Justice Ginsburg, is
20 that the question is whether the act of Congress
21 remedies the already adjudicated constitutional
22 violation and is consistent with the injunction. In the --

23 CHIEF JUSTICE ROBERTS: So when you get to
24 the consistent with the injunction part -- I thought it
25 was your position that we should review this question

1 solely under an abuse of discretion standard.

2 MR. ELIASBERG: It is our position --

3 CHIEF JUSTICE ROBERTS: Because while the
4 Court did not decide the validity of the act in the
5 first case, it certainly did in the second case, which
6 is why we have the case before us.

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

9 First, we believe in the enforcement context
10 where the question is, is this a violation of an already
11 entered injunction that was part of a final judgment,
12 that that is traditional equity principles that you
13 review for an abuse of discretion. Nonetheless, we
14 believe that we win even under a de novo standard.
15 So -- and if I could set forth some of the reasons for
16 that.

17 I think, Justice Breyer, that you have it
18 exactly correct, that what the government has done here
19 by selecting a particular transferee who has been given
20 preferential access to the land in the past to the
21 exclusion of others who wanted to erect other symbols,
22 that the government is taking affirmative steps to
23 permit, through this transfer statute, the display of
24 the cross that they are enjoined from doing.

25 Now, Justice Scalia, I believe your point is

1 that at some point, if this is on private land and the
2 government is not making any efforts to further this
3 display, that it couldn't possibly be that the
4 injunction forbids that. And that may well be correct,
5 but that's not the case we have in front of it.

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

9 JUSTICE ALITO: When this injunction was
10 first entered, the statute -- nobody contemplated that
11 this statute was going to be enacted; isn't that
12 correct?

13 MR. ELIASBERG: When the district court
14 entered the injunction. That is correct, Justice Alito.

15 JUSTICE ALITO: Yes. And so isn't the
16 sensible interpretation of the injunction that it was
17 prohibiting the government from permitting the display of
18 the cross on government property, and not on private
19 property that happens to be within the Mojave National
20 Preserve?

21 MR. ELIASBERG: I don't believe so, Justice
22 Scalia -- excuse me -- Justice Alito, for a couple of
23 reasons. One of the bases for the entry of the
24 injunction in the first instance was the way that the
25 government had favored one party to come on, contrary to

1 the government's own regulations, and erect a permanent
2 symbol, while not allowing others. So --

3 JUSTICE ALITO: Well, wasn't it your argument
4 that this was a violation of the Establishment Clause
5 because it was on government land? Did you make the
6 argument that even if this was on one of the ranches
7 within the Mojave National Preserve, it would still be a
8 violation of the Establishment Clause?

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

11 JUSTICE ALITO: Yes, it was a totally -- so
12 the situation completely changed, and the district court
13 either modified the injunction -- it seems to me
14 modified the injunction by interpreting it to mean
15 something quite different from what anybody contemplated
16 it meant when it was originally entered.

17 MR. ELIASBERG: Well, I think that, as is
18 traditional equity principles, the district court is at
19 some level the master of the injunction and that's why
20 we give an abuse of discretion standard. The district
21 court very clearly said: I see this as an attempt by
22 the government not to abide by my injunction; they are
23 favoring the same parties they favored when -- that was
24 part of the --

25 JUSTICE SCALIA: Well, of course, it was

1 that, but the question is whether it was a permissible
2 amendment by the government of the situation. Of
3 course, I will stipulate that the government was trying
4 to arrange it so that the cross could remain there. But
5 that doesn't mean that it was -- it was evading the
6 injunction. I mean, that's --

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

8 JUSTICE SCALIA: Unless the injunction
9 clearly applied to the erection of a cross on private
10 land that the government had -- had transferred.

11 MR. ELIASBERG: Well, but it's not the
12 erection of the cross. It is a transfer of something
13 where the government has a reversionary interest. It
14 very much directs the way the VFW is likely to use the
15 land. It selected a particular transferee who has been
16 favored from the beginning. They didn't say: We're
17 going to neutrally sell the land in order to allow this
18 constitutional violation to be --

19 JUSTICE SCALIA: I will -- I will concede
20 that the obvious purpose of that was to avoid being in
21 violation of the injunction. But that doesn't mean that
22 it's invalid.

23 MR. ELIASBERG: Well, I believe it's invalid
24 because I think that the affirmative steps they are
25 taking here really make them -- put them in a position

1 where they are permitting --

2 JUSTICE SOTOMAYOR: Can -- can -- what --
3 what -- let's start from the beginning. Can -- would it
4 be proper for the government or would the government be
5 alleged to have violated the Establishment Clause if on
6 another ranch that cross -- a cross went up?

7 MR. ELIASBERG: No, they would not.

8 JUSTICE SOTOMAYOR: All right. So really
9 your argument is that the reason this Court -- this
10 cross on private land, if it becomes private, is
11 offensive to the Establishment Clause is because of the
12 government's prior history with respect to that cross,
13 correct? That's -- that's your argument?

14 MR. ELIASBERG: That is one part of my
15 argument, but there is another part. The government
16 has taken the step of designating this cross one of 49
17 national memorials in the whole country and the only
18 national memorial commemorating American service in
19 World War I, even though it's clear in the record --

20 JUSTICE SOTOMAYOR: So are you alleging that
21 doing that violates the Establishment Clause, passing or
22 designating a religious symbol as a national memorial,
23 that that violates the Establishment Clause?

24 MR. ELIASBERG: We are alleging that under
25 the totality of the circumstances, which includes the

1 national memorial designation, the government's asserted
2 purpose to make sure that the cross remains up, the
3 government's favoritism of the same parties that it has
4 always favored in this case to the exclusion of others,
5 and the maintaining of a property interest in the land
6 in the form of a reversionary interest, all of those
7 things --

8 JUSTICE SOTOMAYOR: Does that apply to all
9 lands in this preserve?

10 MR. ELIASBERG: I'm sorry -- does what apply
11 to all lands?

12 JUSTICE SOTOMAYOR: Does the reversionary
13 interest apply to all of lands on this preserve?

14 MR. ELIASBERG: No --

15 JUSTICE SOTOMAYOR: Maybe your adversary has to
16 answer that instead of you, but all the other private
17 property owners.

18 MR. ELIASBERG: No, the reversionary
19 interest specifically says the land reverts to the
20 government if the --

21 JUSTICE SOTOMAYOR: No, no, no. Are all of
22 the private owners on this preserve required to give the
23 land back to the U.S. if they put it to some different
24 use?

25 MR. ELIASBERG: I don't believe that that

1 is true.

2 CHIEF JUSTICE ROBERTS: Counsel, if -- if --
3 if the government sold this land to a private party, no
4 cross in the picture at all, and they go to settlement
5 and at settlement the private landowner who is going to
6 buy it says, you know, I'm going to put a big cross up
7 on this property once I get it. Can the government still
8 sell it to him?

9 MR. ELIASBERG: Yes, absolutely.

10 CHIEF JUSTICE ROBERTS: Okay.

11 MR. ELIASBERG: If the basis for the
12 government's decision to sell the -- sell the land was a
13 neutral basis. And that's what we are saying here. If
14 what the government has done --

15 CHIEF JUSTICE ROBERTS: So even though --
16 before the sale, even though the government knows there
17 is going to be a big cross on the land with the same
18 situation you have here, in the middle of the preserve
19 and all, that's perfectly okay?

20 MR. ELIASBERG: No, it's -- we --

21 CHIEF JUSTICE ROBERTS: I thought you said
22 before the government sold the land if they find out the
23 new owner is going to put a cross on it there is no
24 problem.

25 MR. ELIASBERG: The difference between those

1 two scenarios, Mr. Chief Justice, is one is a remedial
2 context. The government has been held to violate the
3 Constitution. They have to, under Milliken v. Bradley
4 and U.S. v. Virginia, take all steps necessary to erase
5 that constitutional violation.

6 The situation in the first hypothetical you
7 gave me, there has never been an adjudicated
8 constitutional violation. It's a very different
9 situation.

10 JUSTICE STEVENS: Isn't it also a very
11 different case if a condition of the transfer is that
12 the transferee will preserve a memorial that has been
13 designated in a statute as a 5-foot-tall white cross?

14 MR. ELIASBERG: I think that is --

15 JUSTICE STEVENS: That was a condition of
16 the transfer.

17 MR. ELIASBERG: As I was stating to Justice
18 Sotomayor, that is one of the factors that we believe
19 separates this situation from the kind of hypotheticals
20 that you're setting forth --

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

24 MR. ELIASBERG: I think that there are very
25 significant obstacles to their doing that. One, I don't

1 -- I disagree with the General's -- General Kagan's
2 description of the criminal statute that prohibits the
3 defacement of memorials on private land, because one of
4 the provisions is that we will consider it a situation
5 that is covered by the statute that the land be under
6 the jurisdiction of the Federal Government. Well, the
7 land -- the statute that designated the Mojave Preserve
8 very clearly says that the land is being transferred
9 from the jurisdiction of the Bureau of Land Management
10 to the National Park Service and the Secretary of the
11 Interior. So it is therefore clearly under the
12 jurisdiction of the Federal Government. So I think that
13 there is -- there are possible criminal violations.
14 There is also a significant question --

15 CHIEF JUSTICE ROBERTS: You said under the
16 jurisdiction of the Federal Government. Does that -- do
17 you just mean they have authority to regulate the land?

18 MR. ELIASBERG: That's correct. But that's
19 the way the statute is written, under Federal
20 jurisdiction. So I believe that those two terms --

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

24 MR. ELIASBERG: Well, I think that in this
25 case when the government is actually -- there's quite a

1 bit of case law -- we set forth some of in our brief --
2 where they talk about the government's power over land
3 that's within a national preserve. So I do think that
4 the criminal statutes may very well apply.

5 It certainly would be a barrier to the VFW's
6 thinking, well, no risk to us if we tear this cross
7 down. In addition, the government is required, as I
8 believe one of the Justices and I don't remember
9 which -- the government has been required to go back and
10 put up a plaque that says: This cross erected in honor
11 of the foreign war dead. It would be very odd indeed, I
12 believe for the VFW --

13 CHIEF JUSTICE ROBERTS: What else -- what
14 else does the plaque say?

15 MR. ELIASBERG: The plaque says: "This
16 cross" -- in big letters -- "erected in honor of the
17 dead of foreign wars." I think it would be very --

18 CHIEF JUSTICE ROBERTS: And that's it?
19 Nothing else?

20 MR. ELIASBERG: Nothing else. I think it
21 would be very odd indeed for the VFW to feel that it was
22 free to take down the cross and put up, for example, a
23 statue of a soldier which would honor all of the people
24 who fought for America in World War I, not just
25 Christians, and say: Well, we were free to do that

1 because even though there's the sign that says, this
2 cross is designated to honor all the --

3 JUSTICE SCALIA: The cross doesn't honor
4 non-Christians who fought in the war? Is that -- is
5 that --

6 MR. ELIASBERG: I believe that's actually
7 correct.

8 JUSTICE SCALIA: Where does it say that?

9 MR. ELIASBERG: It doesn't say that, but a
10 cross is the predominant symbol of Christianity, and it
11 signifies that Jesus is the son of God and died to
12 redeem mankind for our sins. And I believe that's why
13 the Jewish war veterans --

14 JUSTICE SCALIA: It's erected as a war
15 memorial. I assume it is erected in honor of all of the
16 war dead. It's the -- the cross is the -- is the most
17 common symbol of -- of -- of the resting place of the
18 dead, and it doesn't seem to me -- what would you have
19 them erect? A cross -- some conglomerate of a cross, a
20 Star of David, and you know, a Moslem half-moon and
21 star?

22 MR. ELIASBERG: Well, Justice Scalia, if I
23 may go to your first point, the cross is the most
24 common symbol of the resting place of Christians. I
25 have been in Jewish cemeteries. There is never a cross

1 on a tombstone of a Jew.

2 (Laughter.)

3 MR. ELIASBERG: So it is the most common
4 symbol to honor Christians.

5 JUSTICE SCALIA: I don't think you can leap
6 from that to the conclusion that the only war dead that
7 that cross honors are the Christian war dead. I think
8 that's an outrageous conclusion.

9 MR. ELIASBERG: Well, my -- the point of
10 my -- my point here is to say that there is a reason the
11 Jewish war veterans came in and said: We don't feel
12 honored by this cross. This cross can't honor us
13 because it is a religious symbol of another religion.

14 CHIEF JUSTICE ROBERTS: Can I get back to
15 your plaque question? Am I wrong? I thought the
16 government told us the plaque reads: "The cross erected
17 in memory the dead of all wars, erected 1934 by members
18 of Veterans of Foreign Wars, Death Valley Post 2884."

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

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

1 MR. ELIASBERG: Mr. Chief Justice, the
2 context of your question was, would the VFW feel
3 constrained to keep the cross up? And my point was it
4 would be --

5 CHIEF JUSTICE ROBERTS: The context of my
6 question was, what does the plaque say?

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

10 CHIEF JUSTICE ROBERTS: All right.

11 MR. ELIASBERG: My only point was that in
12 that scenario, because I did believe we were talking
13 about would -- is the VFW free to do this, and I was
14 pointing to the criminal statute that I said -- I believe
15 said that they couldn't -- wouldn't feel free to take this
16 down. But second of all, that it would be odd indeed for
17 them to take it down when there is a big plaque that says
18 "This cross erected." With all of the text --

19 JUSTICE ALITO: When the -- when the Solicitor
20 General represents to us that the VFW will be perfectly
21 free to modify this memorial in any way it chooses if they
22 obtain title to this land, do you think that there's any
23 realistic fear that they will be required to maintain this
24 cross, even if they wish to -- to change it in some way?

25 MR. ELIASBERG: Well, I think that there is
26 a real -- well, but -- but I don't think that the cases

1 turn on whether a prosecutor says, well, I promise you
2 that we are not going to enforce the statute. I think
3 we have to look at the words of the statute and the
4 words of the reversionary interest, and I think they
5 both create significant doubt as to whether the VFW
6 would feel free to turn this -- to take it down, in the
7 same way that in a context where you are talking about
8 pre-enforcement --

9 JUSTICE ALITO: Well, I thought your
10 argument was that although there was going to be a
11 formal transfer of title, as a practical matter, the
12 government was still involved with the maintenance of
13 the cross on this land. And when the government says
14 that that's not the case, I don't know why that doesn't
15 cure the practical problem.

16 MR. ELIASBERG: Well, that -- the -- the
17 question of government -- continued government
18 involvement with the land, I believe, continues, because
19 of the reversionary interest and because of the
20 designation as a national memorial. Whatever the --

21 JUSTICE GINSBURG: I think -- I think
22 General Kagan agreed that they -- the Veterans couldn't
23 substitute some other memorial, and if it's going to be a
24 national monument, it has to have the government's
25 approval. And the only one that has the government's

1 approval is the cross.

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

5 JUSTICE ALITO: Well, I -- I thought the
6 government's position was it had to be maintained as a
7 national war -- as a war memorial, but not that it had
8 to be maintained as a cross.

9 MR. ELIASBERG: That is the government's
10 position. But, Justice Ginsburg, your question is, would
11 something else that could be put up be a national
12 memorial, and the answer is no. Only Congress has the
13 power to designate a national memorial. Congress has
14 chosen to designate this particular stand-alone Latin
15 cross as a government -- as a national memorial.

16 JUSTICE GINSBURG: What about the
17 government's argument that suppose the government took
18 down the cross, gave it back to the Veterans of Foreign
19 Wars, sold them the land in exchange for land of equal
20 value, and then the Veterans said, fine, the cross was
21 ours to begin with; now the land is ours, so we just
22 put it back? If that would be consistent with the
23 injunction. The government now has nothing to do with
24 the cross. It's all the Veterans of Foreign Wars, and
25 it can't be regarded as sham because it was originally

1 the Veterans of Foreign Wars who put it up; the
2 government didn't put it up.

3 MR. ELIASBERG: I believe that that --
4 obviously, not the facts presented by our case, Justice
5 Ginsburg, but that likely would be consistent with the
6 Injunction. That's correct. But it is not the scenario
7 we have here.

8 JUSTICE GINSBURG: Then we are talking about
9 something that is rather formal rather than substantial.
10 If -- if all the government had to do is say,
11 Congress, you didn't get it right; you should have just
12 made the land swap. And then the government would take
13 down the cross in compliance with the injunction, and
14 then it goes right back the next day.

15 MR. ELIASBERG: Well, I think if there -- if
16 there were -- I think it's not just formalism, Your
17 Honor, because, one, the reversionary -- I am assuming
18 that in your hypothetical the reversionary interest is
19 gone. That is a continuing government ownership, future
20 ownership in property, and one of the government's
21 principal arguments is when we sell to it a private
22 owner, everyone presumes that the private owner is the
23 speaker.

24 But when the government maintains a
25 substantial future property interest, they haven't sold

1 the land. They've sold part of their interest in the
2 land. So if you take away the reversionary interest and
3 you remove the national memorial designation and then
4 the VFW independently does choose to put up the cross,
5 it's more than formalism. It is a significant --

6 JUSTICE STEVENS: But there is also the
7 point that I don't think you've stressed, that if the
8 reversionary interest was activated -- say, they
9 abandoned or destroyed it, the property would come back
10 to the government. And if I read the -- the designation
11 of the national memorial statute correctly, the
12 Department of Interior would have to rebuild the old
13 cross and put it up. There's an affirmative duty to
14 replace the cross if there is a reversion.

15 MR. ELIASBERG: I believe that that is
16 correct, Justice Stevens --

17 JUSTICE STEVENS: It's on 7a of the --

18 MR. ELIASBERG: -- and that's an important
19 point that is intertwined with the fact that the
20 reversionary interest also continues the government's
21 ownership in the land, when their whole position is, if we
22 privatize it, as Justice Scalia pointed out, if it's just
23 a private owner, then we don't associate this cross with
24 the government. We associate it with the private owner.

25 But the government hasn't done that. It has

1 maintained an important ownership interest in the land
2 through that reversionary interest.

3 If there are no further questions, I will --

4 JUSTICE STEVENS: May I ask this question:
5 Do you think the issues in this case would be, say,
6 the same or different if this whole scenario occurred
7 on the Mall in -- right out in front of the
8 Washington -- the Lincoln Memorial?

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

11 MR. ELIASBERG: Context has always mattered
12 to this Court in Establishment Clause cases.

13 JUSTICE STEVENS: And which way would it
14 cut, if it is different?

15 MR. ELIASBERG: Well, I do think that
16 Washington is, certainly, a seat of power, and there is,
17 obviously, a close tie between something that is put on
18 the National Mall and the seat of government, but I do
19 think that the designation of a national memorial is
20 also significant.

21 So, even though this may be an area that is
22 not nearly as populated as Washington, D.C., it is very
23 significant that Congress has taken the step with this
24 particular symbol, one of only 49 in the country,
25 grouping it with other iconic statues and memorials in

1 this country and tied it.

2 So I don't think that the distinction,
3 although it might have some bearing in the Court, in
4 thinking of the context, I don't think it would change
5 the result.

6 Justice Kennedy, I want to go back to -- to
7 one question you had asked earlier about the posture,
8 and I just want to reiterate. You, very clearly, said,
9 when the government was saying, well, we didn't have a
10 good reason to bring this to the Court, and that's why
11 we didn't, I think your question recognized that the
12 government had very good reasons.

13 But -- but in addition, it's not really
14 important, when you have a final judgment, why a party
15 chooses not to try to take the last step of appeal on a
16 final judgment, and that's the United States v.
17 Munsingwear case.

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

22 JUSTICE ALITO: Well, wasn't -- isn't this
23 very different from the situation in Toledo
24 Steel because -- Scale, I'm sorry -- because, if the
25 merits issue that was before the Ninth Circuit was, if

1 not technically moot, nearly moot, by the time they
2 reached it, because of the passage of the new statute?

3 This wasn't -- they said it's not moot
4 because this is simply the voluntary cessation of
5 conduct that's been held to be unlawful, but that is
6 typically applied in the situation where there is a
7 legitimate fear that the -- the party that has been held
8 to be violating the Constitution may simply return to
9 its bad old ways, once the litigation is over.

10 But, here, you have the intervening
11 enactment of a statute by the Constitution -- by the
12 Congress of the United States, and I think it would be
13 quite far-fetched to presume that Congress is simply
14 going to repeal that statute and go back to the way
15 things were, once the litigation is over.

16 So you have a merits issue that's, if not
17 technically moot, nearly moot. The real merits issue in
18 the case is -- is expressly not decided by the Ninth
19 Circuit. They say, take that back to the district
20 court. And you say that the standing issue goes away
21 because the government didn't appeal the standing issue
22 at a time when the real merits issue in the case had not
23 been decided.

24 MR. ELIASBERG: Well, two points, if I may,
25 Justice Alito. First, the first reason that the Ninth

1 Circuit gave for why the case wasn't moot was not
2 voluntary cessation. The government conceded the land
3 transfer could take up to 2 years to effectuate. And so
4 then the Ninth Circuit said that this case is far from
5 moot. Two years is more than enough time for
6 the government to file the petition for certiorari and
7 had a ruling both on the merits of the land on -- the
8 cross on government property, but more important, as a
9 number of Justices have pointed out, the question of
10 standing to bring an Establishment Clause case -- the
11 government always has an interest in saying, this case
12 never should have been brought, and we never should had
13 have had a judgment entered against us.

14 For the government to say, we didn't really
15 care at that point because, 2 years from now, the
16 transfer might be effectuated is not basis for them to
17 argue that there was no final judgment and no reason for
18 us to appeal.

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

24 But there was something that I did want to
25 ask you about, Judge O'Scannlain's opinion. He said:

1 If -- if you prevail and you are right, what happens in
2 Arlington Cemetery, where there's the Argonne Cross
3 Memorial and the Canadian Cross of Sacrifice, both right
4 here in Arlington? What happens to them?

5 MR. ELIASBERG: Going back, Justice
6 Ginsburg, to the merits on the earlier question about a
7 cross on government property, I believe that the Argonne
8 Cross in the National Memorial Cemetery is extremely
9 different.

10 There are, in the national cemeteries,
11 the -- the VA offers to veterans and their families, a
12 choice of putting up 39 different emblems of belief on
13 their tombstones. In Arlington, there is a cross that
14 is surrounded by a sea of tombstones with symbols of the
15 faith of all of the different service members.

16 In that context, I don't think anyone would
17 perceive that the government was favoring one particular
18 religion because of the variety of choices in religious
19 symbols expressed there. That's very different from a
20 stand-alone cross of one religious symbol that is not
21 surrounded by any other context, other than --

22 JUSTICE SCALIA: Has the government ever
23 turned down -- let's say the Jewish war veterans' request
24 to put up a war memorial on -- on public land?

25 MR. ELIASBERG: They did. There was a

1 request made for -- to put up a memorial on the site,
2 and the government said no and said our regulations
3 forbid it.

4 JUSTICE SCALIA: No, let's talk -- on
5 this site?

6 MR. ELIASBERG: Yes.

7 JUSTICE SCALIA: Yes, well, I'm not
8 talking about this site, where there already was a
9 memorial, but suppose the -- what I'm getting at is I
10 don't agree with you, that -- that every time the
11 government allows any religious symbol to be erected, it
12 has to allow all religious symbols to be erected at the
13 same place. So long as it is -- it is not discriminatory
14 in -- in accepting or rejecting requests to erect
15 religious symbols in different places, I don't see why the
16 government is convicted of being discriminatory.

17 MR. ELIASBERG: I think the context here is
18 what has the government done with respect to national
19 memorials. The only two national memorials that are
20 stand-alone religious symbols are of one particular
21 religious denomination, and that's Christianity.

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

25 MR. ELIASBERG: Well, it's Congress -- I

1 don't know that the Veterans of Foreign Wars ever
2 proposed that this be a national memorial. Congress
3 designated it as one.

4 JUSTICE SCALIA: Well, but it was erected by
5 the Veterans of Foreign Wars. I mean, do you know of
6 any instance in which Jewish war veterans, or -- or if
7 there's an organization of Muslim war veterans, requested
8 to erect a memorial on public land, it was turned down?

9 MR. ELIASBERG: As I said before --

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

13 MR. ELIASBERG: I'm not saying that in --
14 in -- that, in every circumstance, the government has to
15 have lots of different symbols, but what the government
16 has done here --

17 JUSTICE SCALIA: Oh, I think you are
18 saying that, and you are saying that this has to be a
19 public forum. In fact, I -- I'm not even sure your --
20 your brief would limit it to religious symbols. You say
21 it has to be an open forum, right?

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

1 There is a final judgment set in this
2 circumstance. In this context, it is not. So that
3 question is not properly before us, but context matters,
4 and I do think, in other circumstances, there may be
5 religious symbols. There may be a myriad of religious
6 symbols, and the context of the situation will matter.

7 But I think if, in Arlington, for example --
8 with respect to Justice Ginsburg's question -- if, for
9 example, a foreign government -- let's take the Canadian
10 Cross of Sacrifice, which the government has put in its
11 brief, was donated by a foreign government to honor
12 people -- Americans who fought for Canada and the
13 British Empire, in I believe it was World War I. If the
14 State of Israel made a similar request to the United
15 States -- we would like to honor the Jews who fought in
16 Operation Iraqi Freedom because we believe that that was
17 an important defense of the State of Israel -- and the
18 United States said no, we are not interested, I think
19 that that would create a quite significant
20 constitutional violation -- or a constitutional question,
21 but it's not the case in front of us.

22 JUSTICE STEVENS: May I ask a different
23 question, just based on your understanding of all these
24 monuments? Are there any other federal monuments that
25 contained crosses, other than those associated with

1 cemeteries?

2 MR. ELIASBERG: The one national memorial
3 that I am aware of that has a cross, it is of Father
4 Marquette, who was a significant historical figure. It
5 is not a stand-alone cross. It is Father Marquette
6 surrounded by a number of various objects that show his
7 role as a historical figure, exploring the Middle West,
8 and he is holding a cross.

9 But, again, I think -- I agree with General
10 Kagan that, if we honored Martin Luther King, who was a
11 priest, or we honored -- we did something with the Old
12 North Church which has significant historical
13 significance, that would create a very different issue
14 than simply a stand-alone cross, where, when the
15 National Park Service asked its own historian to
16 determine whether it had historical value necessary to
17 bring it within the National Register of Historic
18 Places, the Park Service's own historian said no, it
19 did not.

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

24 (Laughter.)

25 MR. ELIASBERG: Because the man who

1 originally put up the cross -- not this one, because it
2 has been replaced a number of times, but the man who put
3 up this particular cross, I believe was a homesteader in
4 the area when the land was owned by the Bureau of Land
5 Management, and I believe was a miner on the land. I
6 hope that is correct historically. I believe it is.

7 CHIEF JUSTICE ROBERTS: Thank you.

8 General, you have 3 minutes.

9 REBUTTAL ARGUMENT OF GEN. ELENA KAGAN

10 ON BEHALF OF THE PETITIONERS

11 GENERAL KAGAN: Thank you, Mr. Chief
12 Justice.

13 To pick up right there, this stand-alone
14 cross was erected as a World War I memorial by veterans
15 of World War I who had gone to the desert in California
16 to recuperate and to restore their lives.

17 And -- and it was that situation that the --
18 that the Congress was presented with, was when the Ninth
19 Circuit ruled and said that this memorial was
20 unconstitutional, Congress had a choice. And the choice
21 was to take down that memorial, which meant an enormous
22 amount to veterans in the community, or to completely
23 dissociate the government from that memorial. And what
24 Congress did was to completely dissociate the government
25 from that memorial while allowing some --

1 JUSTICE STEVENS: How can you say that --

2 GENERAL KAGAN: -- war memorial to
3 stand.

4 JUSTICE STEVENS: -- when there's a
5 reversionary interest? How can you say it's completely
6 dissociated? There's a reversionary interest. If they
7 don't maintain the cross, which is the monument, it goes
8 back to the government.

9 GENERAL KAGAN: Justice Stevens, with
10 respect, the reversionary interest says that the holder,
11 the VFW, has to maintain a war memorial. It does not have
12 to be --

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

15 GENERAL KAGAN: No, the reversionary
16 interest simply says: A war memorial.

17 JUSTICE STEVENS: Yes, but it -- but this --

18 GENERAL KAGAN: It does not have
19 to be this war memorial.

20 JUSTICE STEVENS: You don't think it's fair
21 to interpret Congress's interest to being -- in preserving
22 this memorial?

23 GENERAL KAGAN: To the contrary, Justice
24 Stevens. When Congress wanted to say "this memorial,"
25 it knew how to say it, because it said it in the 2002

1 Act.

2 JUSTICE STEVENS: Right.

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

14 JUSTICE STEVENS: Do you think anyone
15 thought there was the remotest possibility they would put
16 up a different memorial?

17 GENERAL KAGAN: I think it's left to the
18 VFW, and it's entirely the VFW's choice. So if tomorrow
19 or 10 years from now or 50 years from now the VFW
20 decides, along with Respondents, that a cross is an
21 inappropriate war memorial, then they can take down that
22 war memorial. It is no longer the government's message.

23 JUSTICE STEVENS: How can they say it's an
24 inappropriate war memorial when Congress has designated
25 the national memorial as, quote, "the five-foot-tall

1 white cross" and so forth and so on? That is what is
2 the memorial.

3 GENERAL KAGAN: But there's -- there's
4 no prohibition on the VFW taking down this memorial. We
5 will just have one fewer national memorials. And --

6 JUSTICE STEVENS: Do you really think there
7 is any possibility that would happen?

8 GENERAL KAGAN: Again, I think it is
9 entirely up to the VFW.

10 JUSTICE STEVENS: That's not my question.

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

16 So what the government has done here is -- and
17 -- and Justice Stevens, I don't want to -- of course, you
18 are right that Congress started out thinking that --

19 JUSTICE STEVENS: They not only started it
20 out, but they authorized the use of \$10,000 in money in
21 order to replace the very cross they had designated as a
22 memorial.

23 GENERAL KAGAN: Justice Stevens, you are, of
24 course, right that Congress thought at the beginning,
25 prior to the injunction, that this war memorial should

1 not be taken down, that there was an attachment to it in
2 the local community, and that it was -- that it should
3 be retained. Not an unnatural thing for Congress to
4 want, to preserve war memorials.

5 When the injunction issued and when the
6 Court found that the -- when the Congress found that the
7 Court had declared this display of this memorial
8 unconstitutional, Congress said: How can we preserve
9 this -- preserve a war memorial, very possibly this war
10 memorial? How can we preserve a war memorial but -- but
11 have it not be our choice? And --

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 Counsel, counsel.

14 The case is submitted.

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

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A	<p>ago 23:15</p> <p>agree 14:10 51:10 54:9</p> <p>agreed 42:22</p> <p>AL 1:4</p> <p>Alito 4:21,24 19:23 30:9,14 30:15,22 31:3 31:11 41:19 42:9 43:5 47:22 48:25</p> <p>alleged 33:5</p> <p>alleging 33:20,24</p> <p>allow 32:17 51:12</p> <p>allowing 31:2 55:25</p> <p>allows 5:12 51:11</p> <p>alternative 25:17</p> <p>amend 26:18</p> <p>amendment 32:2</p> <p>America 38:24</p> <p>American 33:18</p> <p>Americans 53:12</p> <p>America's 3:19</p> <p>amount 55:22</p> <p>Angeles 1:19</p> <p>answer 4:15 34:16 43:12</p> <p>answered 16:8</p> <p>anybody 12:12 24:23 31:15</p> <p>apologize 40:20 41:7</p> <p>appeal 15:17 16:4 47:15 48:21 49:18</p> <p>appealed 10:24</p> <p>appeals 6:25 7:15,16,19 10:12 13:11 15:4</p> <p>APPEARANC...</p> <p>1:15</p> <p>applied 7:20 32:9</p>	<p>48:6</p> <p>applies 6:14</p> <p>apply 34:8,10,13 38:4</p> <p>appreciate 16:18</p> <p>approach 27:12</p> <p>appropriately 17:17</p> <p>approval 5:17 42:25 43:1</p> <p>approve 6:2</p> <p>area 20:6 21:1,4 21:7 23:8,10 24:24 25:15 46:21 55:4</p> <p>Argonne 50:2,7</p> <p>argue 13:16 49:17</p> <p>argued 7:11 21:18,18</p> <p>arguendo 18:6</p> <p>argument 1:13 2:2,7 3:4,6 6:21 17:13 18:4,9 19:6 20:7 26:2 31:3,6,10 33:9 33:13,15 42:10 43:17 55:9</p> <p>arguments 44:21</p> <p>Arlington 50:2,4 50:13 53:7</p> <p>arrange 32:4</p> <p>asked 10:11,21 12:20 15:8 18:15 47:7 54:15</p> <p>asking 11:5 24:1</p> <p>aspects 14:20</p> <p>asserted 34:1</p> <p>associate 45:23 45:24</p> <p>associated 53:25</p> <p>assume 12:13 17:10 39:15</p> <p>assuming 44:17</p>	<p>attachment 59:1</p> <p>attempt 31:21</p> <p>authority 37:17</p> <p>authorized 58:20</p> <p>automatically 5:24</p> <p>avoid 17:13 32:20</p> <p>aware 27:24,25 54:3</p> <p>a.m 1:14 3:2 59:15</p>	<p>34:25 36:18 37:20 38:8,12 39:6,12 41:12 41:14 42:18 44:3 45:15 50:7 53:13,16 55:3,5 55:6</p> <p>belong 7:4</p> <p>better 17:2</p> <p>big 35:6,17 38:16 40:21 41:17</p> <p>bit 6:7 38:1</p> <p>bona 20:11</p> <p>boring 8:19 9:23</p> <p>Bradley 36:3</p> <p>Branch 17:14</p> <p>Breyer 8:17 9:13 10:1,18 11:6,12 11:18,25 18:11 18:25 19:1,11 19:17,22 26:6 26:16 27:3 29:17</p> <p>brief 25:21 38:1 52:20 53:11</p> <p>briefly 23:24</p> <p>bring 47:10 49:10 52:23 54:17</p> <p>British 53:13</p> <p>brought 49:12</p> <p>bunch 8:21</p> <p>Buono 1:7 3:4 47:21</p> <p>Buono's 26:18</p> <p>Bureau 37:9 55:4</p> <p>buy 35:6</p>
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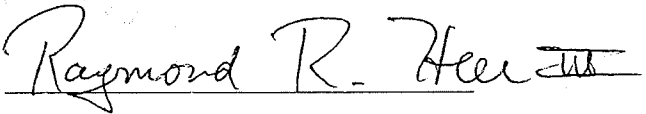
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of; KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL., Petitioners, v. FRANK BUONO.; and that these attached pages constitute the original transcript of the proceedings for the records of the Court.

Handwritten signature of Raymond R. Heer in cursive script, underlined.

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