

No. 06-55769
No. 06-55919

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHILIP K. PAULSON,

Plaintiff-Appellee,

v.

CITY OF SAN DIEGO,

Defendant-Appellant,

SAN DIEGANS FOR THE MOUNT SOLEDAD
NATIONAL WAR MEMORIAL,

*Proposed Intervenor-
Appellant,*

MOUNT SOLEDAD MEMORIAL ASS'N, INC.,

Defendant.

On Appeal from the U. S. District Court for the Southern District of California
Honorable Gordon Thompson, Jr.
Civ. No. 89-0820-GT

**BRIEF OF AMICI CURIAE THE COUNCIL FOR SECULAR HUMANISM
AND CENTER FOR INQUIRY IN SUPPORT OF APPELLEE AND
AFFIRMANCE OF THE DISTRICT COURT'S RULING**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amici Council for Secular Humanism and Center for Inquiry state that they are nonprofit corporations that do not issue stock to the public. They are affiliated corporations, but neither corporation has a parent corporation. Neither the amici nor their counsel represent or have appeared for any party in this case.

Dated: August 23, 2006

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INTEREST OF THE AMICI CURIAE

This brief is being filed with the consent of all parties to the appeal.

The Council for Secular Humanism (“Council”) is a nonprofit educational organization headquartered in Amherst, New York. The Council engages in a variety of activities that are designed to support institutions, principles, and values that are consistent with a secular worldview, including democracy, respect for human rights, reliance on reason instead of the supernatural, and freedom of inquiry. In particular, it vigorously defends the rights of the nonreligious. The Council has participated as an amicus in other cases involving civil liberties, including *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005), *Elk Grove Unified School Dist. v. Newdow*, 124 S. Ct. 2301 (2004), and *Washington v. Glucksberg*, 521 U.S.702 (1997).

The Center for Inquiry (“Center”) is another nonprofit educational organization headquartered in Amherst, New York. (It is affiliated with the Council.) Through its publications, conferences and research, the Center encourages evidence-based inquiry into science, pseudoscience, medicine, religion, ethics and secularism. The Center for Inquiry has recently opened an Office of Public Policy in Washington, D. C. The particular focus of the Office of Public Policy is on defending the values of scientific naturalism and secular humanism in the context of U. S. law and public policy. To achieve that end, the Office of

Public Policy produces and publishes white papers on important topics, researches and provides nonpartisan analyses of relevant issues, and participates in litigation, as an amicus or a party, to protect our constitutional values, including religious liberty, reproductive freedom and equality for the nonreligious.

STATEMENT OF FACTS

The Council and the Center adopt, in pertinent part, the statement of facts set forth in the brief of the appellee, Philip Paulson. However, certain salient facts will be mentioned here to provide context to the arguments set forth in this brief.

In 1913, private citizens placed a wooden cross on Mt. Soledad, which is land owned by the City of San Diego. A replacement cross, composed of wood and stucco, was placed on the same site in 1934. A storm destroyed this cross in 1952. In 1954, the Mt. Soledad Memorial Association (“Association”) erected a concrete cross that is forty-three feet tall on the same site. This is the cross that remains on the site today. The cross, which is situated at the top of a large hill, is visible for miles.

Although a ceremony was held in 1954 at which the Association dedicated the cross to veterans of World War I, World War II and the Korean War, the site was not officially designated as a war memorial until litigation over the site commenced in 1989. After appellee Paulson filed suit, a small plaque was placed

near the cross. No other commemorative plaques or other secular memorial symbols were added to the site until on or about 2000.

In 2004, Congress passed legislation stating that the Mt. Soledad site constitutes “a national memorial honoring veterans.” §116, 118 Stat. 3346. This legislation also authorized the Secretary of the Interior to take title to the site upon an offer of the City of San Diego to donate the site. *Id.* Significantly, this legislation also expressly required the federal government to enter “into a memorandum of understanding with the Mt. Soledad Memorial Association for the continued maintenance by the Association of the cross.” *Id.* Apparently because of legal doubts over the validity of such a donation, Congress adopted supplemental legislation just a few weeks ago pursuant to which the United States purported to take immediate possession of the Mt. Soledad site through eminent domain. Pub. L. 109-272 (2006). This law expressly states that it is designed to effectuate the purpose of the prior statute, that is 118 Stat. 3346. *Id.* President Bush signed the recent legislation into law on August 14, 2006.

ARGUMENT

THIS COURT SHOULD AFFIRM THE ORDER OF THE DISTRICT COURT

I. TRANSFER OF THE MT. SOLEDAD CROSS TO THE FEDERAL GOVERNMENT DOES NOT CURE THE VIOLATION FOUND BY THIS COURT

This Court has repeatedly found that the Mt. Soledad cross “is a sectarian symbol that conveys a religious message.” *Paulson v. City of San Diego*, 289 F.3d 1124, 1132 (9th Cir. 2002) (en banc). *See also Ellis v. City of La Mesa*, 990 F.2d 1518, 1527 (9th Cir. 1993) (even if the Mt. Soledad cross could be characterized as a war memorial, it is a “sectarian war memorial [that] carries an inherently religious message and creates an appearance of honoring only [certain] servicemen”). Nonetheless, for well over a decade, the City of San Diego (“City”) has used every conceivable maneuver to preserve this sectarian symbol in defiance of the rulings of the District Court and this Court. The District Court’s patience justifiably came to an end on May 3, 2006, when it ordered removal of the cross within ninety days. Rec. Excerpts 273. This Court should affirm the District Court’s order.

The City and its amici maintain that circumstances have changed because recent federal legislation purports to acquire the Mt. Soledad cross and its immediate environs for the United States. Pub L. No. 109-272; §116, 118 Stat.

3346.¹ They argue that some cases have concluded that the transfer of land on which sectarian symbols or monuments are situated is a means of ending government endorsement of religion and, therefore, the transfer can cure the constitutional violation. *See, e. g., Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005); *Freedom from Religion Found v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000).

However, these cases are inapposite and provide no assistance to the City. It is true that under certain circumstances a sale of real property on which sectarian symbols are located may be “an effective way for a public body to end its inappropriate endorsement of religion.” *Marshfield*, 203 F.3d at 491. But, as the *Marshfield* court expressly recognized, a necessary condition for such a transfer to be an effective means for curing a constitutional violation is that the transferee be a private, nongovernmental entity. *Id.*² In the instant case, the Mt. Soledad site remains securely in government hands; it is simply being acquired by the federal government. Impermissible government endorsement of religion is not rectified by substituting the endorsement of the national government for the endorsement of a

¹ These two separate statutes must be read together to determine the intent of Congress, which is a point we will address further below.

² It is a necessary condition, but not a sufficient condition. A transfer to a private entity may not cure the constitutional violation if other circumstances indicate that government endorsement of religion persists. Indeed, in *Marshfield*, the Seventh Circuit concluded that the sale of property with a statue of Christ to a private party did not “relieve the continued perception of government endorsement.” *Id.* at 497.

municipality. If anything, the impermissible endorsement becomes more blatant. A resolution by a city council pronouncing Christianity the official religion of the city, while undeniably unconstitutional, poses less of a threat to religious freedom than a federal law proclaiming Christianity our national religion.

Admittedly, prior decisions in this litigation relied on the California Constitution. There is no reason to believe, however, that a different conclusion concerning the sectarian nature of the Mt. Soledad cross would be reached under the United States Constitution. To the contrary, this Court has already decided that the presence of a large Latin cross on federal property constitutes a violation of the Establishment Clause. In *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004), this Court found that the so-called Sunrise Rock cross in the Mojave National Preserve projected a message of government endorsement of Christianity. Significantly, the Court reached this conclusion even though the Sunrise Rock cross was substantially smaller than the cross on Mt. Soledad (eight feet instead of forty-three feet tall) and was in a relatively isolated area. Even more significantly, this Court specifically found that it made no difference that “recent legislation designated the Sunrise Rock cross as a federal war memorial.” *Id.* at 549.

Buono does not stand alone. All other federal cases that have addressed the constitutionality of Latin crosses on public property under the Establishment Clause have concluded that the presence of these unmistakably sectarian symbols

violates the Establishment Clause. *E.g., Separation of Church and State Com. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir.1996) (“There is no question that the Latin cross is a symbol of Christianity, and that its placement on public land . . . violates the Establishment Clause.”). The results are no different when the cross is designated a war memorial. *E.g., Jewish War Veterans v. United States*, 695 F. Supp. 1, 14 (D. D. C. 1987) (“The use of a cross as a memorial to fallen or missing servicemen is a use of . . . a religious symbol where a nonreligious one likely would have done as well . . . [The cross] conveys a message of endorsement of Christianity.”) Furthermore, the City’s own counsel concluded in a legal memorandum that “the presence of the cross on federal property would probably not survive scrutiny under the United States Constitution.” Rec. Excerpts 66. Accordingly, even though neither this Court nor the District Court has yet had the opportunity to test the legality of the Mt. Soledad cross under the U.S. Constitution, there can be no doubt about the outcome when the Establishment Clause is applied to these facts.

As *Jewish War Veterans* establishes, designating a cross as a war memorial does not insulate it from the demands of the Establishment Clause. To the contrary, using the symbol of one faith to represent the sacrifice of all veterans makes the endorsement of a particular faith all the more glaring. Few symbols are freighted with more significance and are regarded with more esteem than a war

memorial. To designate a sectarian symbol as the only appropriate way to honor the immeasurable sacrifice of our veterans demeans those veterans who are not Christians. Those who bravely gave their lives for this great country did not do so to establish a theocracy. They fought and died for our precious freedoms, including the freedom to choose one's religious beliefs, without pressure or subtle coercion from the government. War memorials must honor the sacrifice of all Americans regardless of their religious beliefs. War memorials should unite Americans, not provide the impetus for the emotional, divisive controversies that inevitably follow from government endorsement of a particular religious belief.

Upholding the District Court's order would not, contrary to the suggestion of the City and its amici, have any effect on religious markers on graves when these markers are chosen by private individuals. In a classic example of an argument that is designed only to divert the Court's attention from the real issues, it has been suggested that the crosses that are used as markers at some of our national cemeteries, including Arlington National Cemetery, would be at risk if this Court were to uphold the District Court's order. This is nonsense. The markers at Arlington National Cemetery are chosen by the veterans or the veterans' representatives. They represent a cherished right of expression of personal beliefs. Federal law permits individuals buried at Arlington National Cemetery to request a marker of their choice, and there are currently about thirty-five approved symbols,

including crosses. 38 U.S.C. § 2306(a)-(c);

http://www.arlingtoncemetery.org/funeral_information/authorized_emblems.html

(last visited August 21, 2006). Affirmance of the District Court's order will have no impact whatsoever on the use of religious symbols for grave markers that reflect the choice of the individual veteran.

The foregoing confirms that the presence of the Mt. Soledad cross on federal property violates the Establishment Clause, assuming that the federal government has properly acquired the cross. The Council and the Center recognize that the standard practice is for an appellate court to remand to the trial court when the trial court has not had the opportunity to address a relevant issue, but there is a well-recognized exception to this practice, namely when the facts are undisputed and the appellate court is in a position to address the legal questions as capably as the trial court. *E.g.*, *Commissioner v. Gordon*, 391 U.S. 83, 95 n. 8 (1967); *Hormel v. Helvering*, 312 U.S. 552, 557-58 (1941); *Aronson v. Resolution Trust Corp.*, 38 F.3d 1110, 1114 (9th Cir. 1994). This litigation commenced seventeen years ago and has already become as protracted and convoluted as the mythical case of *Jarndyce v. Jarndyce*. See Charles Dickens, *Bleak House* (1853). There is no reason for any further delay. *Buono v. Norton* controls this case and there is no need for a remand to the District Court to determine whether the presence of the Mt. Soledad cross on federal land violates the Establishment Clause.

II. THE FEDERAL LEGISLATION TRANSFERRING THE MT. SOLEDAD CROSS TO THE FEDERAL GOVERNMENT IS ITSELF UNCONSTITUTIONAL

“Under our Constitution, the Federal Government is one of enumerated powers.” *City of Boerne v. Flores*, 521 U. S. 507, 516 (1997). The judiciary has the authority to decide whether Congress has exceeded its powers, in particular whether Congress has exceeded the constraints placed on its powers by the U. S. Constitution, including the Establishment Clause of the First Amendment. *Id.* Plainly, Congress does not have the authority to circumvent the First Amendment or any other constitutional provision by passing a statute. *Id.* at 529.

The judiciary has determined already that a sectarian war memorial consisting principally of a large Latin cross that is maintained on federal property is a violation of the Establishment Clause. *Buono*, 371 F.3d at 549-550. *See also County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 661 (1989) (Kennedy, J. concurring in part and dissenting in part) (“I doubt not, for example, that the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall [s]uch an obtrusive year-round religious display would place the government’s weight behind an obvious effort to proselytize on behalf of a particular religion.”) Accordingly, it cannot be denied that acquisition of the Mt. Soledad site, with its prominent sectarian symbol, violates the Establishment Clause. In this regard, it is important to note that,

pursuant to the recently enacted legislation, the United States has obligated itself to maintain the cross. Maintenance of the cross is expressly mandated by the 2004 legislation and the more recent enactment states that its intent is to “effectuate the purpose of the 2004 legislation.” §116, 118 Stat. 3346; Pub. L. No. 109-272.

Congress’s use of eminent domain to acquire the Mt. Soledad cross cannot circumvent the constraints of the Establishment Clause. As one jurist has noted: “The Constitution does not expressly grant the Federal Government the power to take property for any public purpose whatsoever. Instead the Government may take property only when necessary and proper to the exercise of an expressly enumerated power.” *Kelo v. City of New London*, 125 S. Ct. 2655, 2680 (2005) (Thomas, J., dissenting). Obviously, Congress has no power to acquire and preserve property that is so configured that it serves a predominantly sectarian purpose; indeed, it is expressly prohibited from making such an acquisition, as it has no power to make a law “respecting an establishment of religion.” U.S. Const. amend. I. *See Birdine v. Moreland*, 579 F.Supp. 412 (N. D. Ga. 1983) (Establishment Clause prohibits Georgia from erecting statue of Christ on land acquired through eminent domain.) Congress could not acquire and control a functioning church through eminent domain, even if it decided to characterize the church as a national monument. Similarly, Congress has no authority to acquire

and preserve an immense, towering sectarian symbol that conveys a religious message twenty-four hours a day.

Congress's attempt to maintain a sectarian symbol on Mt. Soledad through the expedient of labeling the site a national war memorial forms part of a troubling pattern of government attempts to circumvent court decisions and the constraints of the Constitution by imaginative and creative designations. *Buono* demonstrates this tactic was already tried, unsuccessfully, with respect to the Sunrise Rock cross. In *McCreary County v. ACLU*, 125 S.Ct. 2722 (2005), local officials tried to evade the Establishment Clause by characterizing their courthouse display of the Ten Commandments as an educational display about American law. The Supreme Court decisively rejected this *post hoc* rationale, concluding that a religious objective permeated the government's action, despite its claimed secular justification. *Id.* at 2734-39. Unfortunately, in the instant case, a similar tactic is being employed. It was only after the instant litigation commenced that the City decided the Mt. Soledad site should be characterized officially as a war memorial, and it is only now, seventeen years after the litigation started and after an order threatening to impose fines on the City for noncompliance with the District Court's injunction, that the federal government decides it must acquire the site as a national war memorial. Were this Court to countenance this tactic, there would be no end to the number of national war memorials or national monuments that would spring up

around the country. Every cross, crèche and statue of Christ that was challenged in litigation would suddenly assume historic significance or become the only fitting means of honoring veterans. The Establishment Clause would become meaningless if it always could be circumvented by passing a cleverly worded law reflecting popular religious sentiment.

That designation of the Mt. Soledad site as a national war memorial is a tactic for preserving the cross on site is not mere speculation. Indeed, those who lobbied for this legislation made no attempt to hide the fact that they were engaged in a “fight to save the Cross” by having it “declared a Federal National Memorial Park.” Rec. Excerpts 45-46. They characterized passage of this legislation as their “last hope to preserve the Mt. Soledad Cross.” *Id.* at 45. Moreover, as indicated, the legislation that was adopted following this lobbying effort expressly mandates preservation of the cross on Mt. Soledad.

One remarkable aspect of this feverish political maneuvering is that it was completely unnecessary if the true goals of supporters of the cross were: (1) to preserve the cross itself; and (2) have Mt. Soledad become a fitting memorial for veterans. These goals could be accomplished readily by transferring the cross to private property, such as a church, while placing an appropriate secular symbol honoring veterans on Mt. Soledad. Both goals are not only permissible but worthy. The Council and the Center recognize the cross has profound meaning for

Christians and we firmly believe Christians have every right to express their faith through various means, including, but not limited to, displays of the cross – provided the cross is on their own property. What those committed to the cross cannot do is enlist the government to broadcast their message; they cannot make the cross “the central part” of a government memorial. Rec. Excerpts 46.

But the most regrettable aspect of the efforts to keep the cross on Mt. Soledad is that it they are so misguided, even -- or perhaps one should say, especially – from the perspective of a devout Christian. If history teaches us anything, it is that government support is a crutch that ultimately cripples religion. The transparent effort to preserve a sectarian symbol by wrapping the flag around it demeans both the cross and the flag. It trivializes the rich religious significance of the cross while simultaneously dishonoring veterans who died for freedom of conscience. Some of the City’s amici contend that government must “accommodate” religion and must not show “hostility” towards it. The Council and the Center agree. However, the “accommodation” mandated by the Establishment Clause is to keep religious institutions and practices autonomous, independent and separate from the government. Moreover, true “hostility” toward religion is manifested by those who would make religion the servant of the government and manipulate religious fervor to advance their own political causes.

Under the Establishment Clause, the purported acquisition of the Mt. Soledad site by the federal government was void *ab initio*. See *United States v. Munoz-Flores*, 863 F.2d 654, 661 (9th Cir. 1988).

III. THE FEDERAL LEGISLATION DOES NOT MOOT THIS CONTROVERSY AND JUDICIAL EFFICIENCY WOULD BE SERVED BY AFFIRMING THE DISTRICT COURT’S ORDER

A “court’s power to grant injunctive relief survives discontinuance of the illegal conduct.” *United States v. W. T. Grant Co.*, 345 U. S. 629, 633 (1953). This principle remains applicable even when the cessation of the illegal conduct results from new legislation. *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U. S. 283, 289 (1982); *Jacobus v. Alaska*, 338 F.3d 1095, 1103 (9th Cir. 2003). Courts are especially wary of lifting an injunction when the cessation of illegal conduct occurs after an adverse judgment. *Jacobus*, 338 F.3d at 1102. In such circumstances, there is a legitimate concern that the defendant will renew its illegal conduct once the threat of an injunction has passed.

As demonstrated by the foregoing analysis, there has been no effective transfer of the Mt. Soledad site to the federal government. The Mt. Soledad site remains in the City’s hands. However, even if the Court concluded otherwise, it should still affirm the District Court’s order to prevent future violations by the City. Given the tortuous path this litigation has followed, and the erratic and inconstant positions taken by the City regarding possible transfer of the site and/or

cross, the possibility that the federal government will return the site to the City cannot be ruled out. Affirming the District Court's order will, at a minimum, have the salutary effect of ensuring that the City cannot maintain Mt. Soledad as a sectarian memorial. It took seventeen years to achieve finality on this issue. It would be imprudent and a disservice to judicial efficiency to vacate the injunction only to find the City once again in possession of the site in a few years.

CONCLUSION

For all the foregoing reasons, this Court should affirm the order of the District Court.

Respectfully submitted,

COUNCIL FOR SECULAR HUMANISM
CENTER FOR INQUIRY

Dated: August 23, 2006

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less.

Dated: August 23, 2006

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