

*Appeal No. 06-55769*

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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PHILIP K. PAULSON,

*Plaintiff and Appellee,*

vs.

CITY OF SAN DIEGO, et al.,

*Defendant and Appellant.*

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On Appeal From the United States District Court  
for the Southern District of California  
Hon. Gordon Thompson, Jr., Presiding  
Case No. 8900820GT

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**BRIEF OF *AMICUS CURIAE* IN OPPOSITION TO APPELLANT  
CITY OF SAN DIEGO'S URGENT MOTION FOR STAY PENDING  
APPEAL UNDER CIRCUIT RULE 27-3(b)**

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**CORPORATE DISCLOSURE STATEMENT  
PURSUANT TO FEDERAL RULES OF  
APPELLATE PROCEDURE, RULE 26.1**

*Amicus curiae* Anti-Defamation League is a non-profit corporation whose goals include preserving religious liberty and the separation of church and state. The Anti-Defamation League does not have any parent corporations. No publicly held corporation owns 10% or more of the Anti-Defamation League.

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## **INTEREST OF *AMICUS CURIAE***

The ANTI-DEFAMATION LEAGUE (“ADL”) was organized in 1913 to advance good will and mutual understanding among Americans of all races and creeds and to combat racial and religious prejudice in the United States. It is today one of the leading civil rights and human relations organizations in the world. ADL believes that its stated goals, as well as the general stability of the democracy, are best served through strict separation of church and state and commensurately strict enforcement of those provisions in the United States and State Constitutions which guarantee the free exercise of religion. As an organization rooted in the Jewish community whose mission includes advancing inter-faith relations, ADL seeks to offer the Court a clearer understanding of the legal issues surrounding the maintenance of a 43-foot tall Latin Cross on property owned by the City of San Diego. ADL believes that the history of the Cross, and the City’s conduct throughout this matter, sets a dangerous precedent which essentially has allowed the City to avoid its constitutional obligations for the past 17 years. It is not just the presence of the Cross, but also the City’s conduct, that now require that this Court deny the City’s request for a stay, and allow for imposition of the

federal district court order of May 3, 2006 directing that the City comply with the federal district court's original order of 1991.

### SUMMARY OF ARGUMENT

The California Constitution specifically prohibits even the appearance of preference for one religion over another, including a preference for sectarian symbols. *Murphy v. Bilbray*, 782 F.Supp. 1420 (S.D. Cal. 1991). At their core, both the United States and California Constitutions prohibit government from "taking sides", or even appearing to "take sides", on matters of religious belief. For the past 17 years, the City of San Diego has waged a complicated legal battle to preserve the 43-foot tall Latin Cross on City-owned property notwithstanding the clear language of the California Constitution and multiple legal precedents. In doing so, the City has proclaimed a message fundamentally inconsistent with government's role as envisioned by the language of the United States and California Constitutions.

The City's application comes to this Court against the backdrop of multiple rulings by the Federal District Court and the San Diego Superior Court which have rejected the City's arguments by holding that the Cross on Mt. Soledad is fundamentally a religious symbol notwithstanding the City's intent that it serve as a memorial to honor

those who have died in the service of their country; that the City's efforts to transfer the land under the Cross were carried out in a manner which violated the Constitutional requirement of religious neutrality; and that the City, in submitting the matter to voters through a ballot initiative known as Proposition A (which sought approval to transfer the land to the federal government), demonstrated a preference for maintaining a religious symbol recognized by only one religious group. The courts that have reviewed this matter have consistently held that the City's conduct has communicated a message of favoritism and endorsement of the majority faith, a message which is inconsistent with the requirement of government neutrality in religious affairs.

ADL submits this brief from the perspective of a religious minority that has, throughout history, faced the worst that minority status offers. Jews, other religious minorities, and those who do not subscribe to religion, have flourished in this wonderful nation precisely because of the strength of a judicial system that values and enforces fundamental constitutional principles notwithstanding the vagaries of public opinion. The ADL respectfully submits that the "public interest" is best served by this Court bringing finality to this matter, thereby reasserting the fundamental principle that we are a

nation of laws even in the face of outcomes not favored by those in the majority.

### ARGUMENT

ADL disagrees with the City's assertion that recent federal decisions signal a new environment for reviewing the constitutionality of religious symbols used in displays with historical significance (citing *Van Orden v. Perry*, 125 S.Ct. 2854 (2005)). To begin with, the City fails to mention the companion case of *McCreary County v. ACLU*, 125 S.Ct. 2722 (2005) in which the Supreme Court ruled that a District Court had properly granted a preliminary injunction enjoining certain counties from displaying the Ten Commandments in courthouses because such displays violated the Establishment Clause of the United States Constitution. In *Van Orden* and *McCreary*, the Supreme Court came to differing conclusions regarding displays of the Ten Commandments in different factual contexts. Such can hardly be characterized as a trend which would support the constitutionality of the maintenance of a Latin Cross on City-owned property under the circumstances presented here.

In both *Van Orden* and *McCreary*, the Supreme Court struggled with the question of the nature of the Ten Commandments, both historically and religiously. It examined closely the location of the

displays and the surrounding environment. ADL submits that a Latin Cross standing on a hill with no other visible religious symbols cannot be compared to the issues before the Court in *Van Orden* and *McCreary*.

More helpful for this Court are cases which have reviewed the constitutionality of Crosses on government-owned property. Most particularly, in the recent case of *Buono v. Norton*, 212 F.Supp.2d 1202, 1217 (C.D. Cal. 2002), the Court held that a Latin Cross situated upon a prominent rock on federal land in the Mohave National Preserve which the government had designated as a national monument for World War I veterans, violated the Establishment Clause of the First Amendment of the United States Constitution.

To the extent that the City must establish the “probability of success on the merits” in obtaining a stay before this Court, ADL respectfully submits that there is nothing in current federal or California case law which would support an argument that the City’s maintenance of the Cross under the circumstances presented here is constitutionally permissible. The consistent rulings against the City by multiple judges in the instant case, including an *en banc* panel of this Court, hardly argues in favor of a “probable” successful outcome in the California Court of Appeals.

ADL further submits that this Court look carefully at how the City defines "the public interest" in its argument that a stay is required. It is not at all clear, which "public" the City is referring to. The City, through its request for a stay, seeks to avoid enforcement of the Federal District Court order directing compliance with an order issued in 1991. More specifically, it would appear that the City's primary concern is the \$5,000 per day sanction ordered by the district court to begin on August 1, 2006. The City's request is essentially designed to hold off enforcement of the 1991 order to allow for yet another appeal of a decision which carefully examined and rejected the same arguments previously advanced by the City in other forums. ADL respectfully submits that there is a "public interest" to be served in bringing this litigation to an end. The City does not need a stay to continue its fight, if that's what it chooses to do. This Court, however, by denying this application, can advance the public interest in the rule of law, the finality of judgments, and fundamental principles of our democracy.

Throughout the history of Establishment Clause jurisprudence, the courts have been mindful of the impact of government practices which serve to endorse religion, or a particular religion, on those who may choose not to subscribe to a religious belief or who maintain

beliefs different from those whose beliefs are at issue. In *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), the Court summarized Establishment Clause jurisprudence by noting that, “[i]n recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of ‘endorsing’ religion, a concern that has long had a place in our Establishment Clause jurisprudence.” *Id.* at 592 (citing *Engel v. Vitale*, 370 U.S. 421, 436 (1962)). The Court continued by stating:

Whether the key word is “endorsement,” “favoritism” or “promotion,” the essential principal remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from “making adherence to a religion relevant in any way to a person’s standing in the political community.” *Id.* at 593-94 (quoting *Lynch*, 465 U.S. at 687 (O’Connor, J., concurring)).

ADL respectfully submits that the message communicated by the City throughout this litigation can hardly be described as neutral toward the non-believing and minority religious communities. It is noteworthy that the Mt. Soledad Memorial Association, the organization responsible for constructing the memorial adjacent to the Cross, has repeatedly asked the City to bring this litigation to an end. The City has rejected the requests of the Memorial Association, and

instead, has chosen to partner with religiously based organizations that have no interest in protecting the rights of Veterans or preserving war memorials.

The courts' concern regarding the impact of government endorsement or promotion of a particular religion is extraordinarily relevant when one considers the atmosphere surrounding the instant litigation. Historically, religious minorities and members of the non-believing community have, understandably, sought to avoid challenging the religious majority in the face of contentious and emotional issues. This case is no exception. San Diego's airwaves, newspapers and the public dialogue in general, have included characterizations of those challenging the Cross as akin to the "Taliban", "Nazis," and other deplorable comparisons. The City by characterizing its effort as "saving the cross," has provided fuel to the argument that those advancing the constitutional arguments are somehow hostile to religion or to Christianity, notwithstanding the efforts of many of those involved in the litigation to find a constitutionally permissible disposition which would preserve the Cross on private land for those who hold an understandable emotional attachment to this very important religious symbol.

The City's representations concerning the vote for Proposition A further obscures the argument and promotes the marginalization, and in certain cases, demonization, of those seeking to preserve the constitutional principles at issue. First and foremost, the City improperly invites this Court to equate "public interest" with "public opinion." The rights guaranteed under the California and U.S. constitutions are not subject to a popularity contest. To the contrary, they are rights guaranteed to every individual despite what the majority of the voting public may favor. In this respect the City's entire argument rests on a fundamentally false definition of the "public interest."

Moreover, while the City is correct that 76% of the City voted in favor of Proposition A authorizing transfer of the Cross to the Federal government, the argument is incomplete. In a previous ballot initiative, Proposition K, the voters resoundingly rejected the City's attempt to transfer the property to private landowners.

Notwithstanding, the City ignores the latter, and continues to promote a message which emphasizes that those challenging the Cross are somehow responsible for thwarting the will of an "overwhelming majority" of San Diegans wishing to preserve the Cross. It is not for ADL to comment on the motivation of the voters. It is, however,

quite unclear as to exactly what the majority of San Diego's citizens desire. Regardless of that desire, it is the constitutional principle of neutrality and the rule of law which are paramount.

Finally, the City has failed to show that it will suffer irreparable harm by complying with the Court's order. First, the City curiously asserts that removing the Cross will "thereby effectively destroy the Veterans Memorial." As mentioned above, the Memorial Association itself is fully prepared to move the Cross and continue its valued service in maintaining the extensive memorial on Mt. Soledad adjacent to the Cross. Second, the City's argument that the action by the district court is "premature" and that a stay is needed to "preserve the status quo" is in essence a request to this Court that it be allowed to engage in the conduct every court has found to be violative of the Constitution over the past 17 years. The "harm" which must be balanced is that caused by continuing to allow the City to act in a manner that is anything but neutral. Third, the City fails to grasp the essence of the state court's decision in arguing that a transfer to the federal government would no longer implicate the California constitution. To the contrary, the very act of trying to transfer the Cross out of the state's hands (in an obvious effort to "save the cross")

is precisely why the state court held that Proposition A was unconstitutional.

The underlying assumption of the City's irreparable harm argument is that the only possible outcome in the litigation is the complete dismantling of the Cross. The constitutional challenge in this case is to the location of the Cross on City property, not to the Cross itself. ADL and others have worked with civic leaders in an attempt to find a solution for moving the Cross to private property so as to preserve what is clearly an important religious symbol. The very characterization by the City of having to "save the Cross" has fueled emotions by implying that the challenge seeks only to tear down the Cross. Nothing could be further from the truth.

All of the above speaks to the need of this honorable Court to assert its fundamental role in bringing finality to this dispute. It is hard to imagine a greater example of why the framers of both the federal and California Constitution sought to prohibit government from acting preferentially toward one religion over others. By allowing this case to be framed as the City "protecting" the Cross, a symbol of immense religious importance, non-Christians have been placed in an untenable and unwelcome position in the community. In "balancing the hardships" and examining the "public interest", ADL respectfully

submits that issuing a stay will only serve to reward a City that has yet to grasp the impact of the message it keeps sending to non-Christians. Hopefully, denying the stay will allow for movement toward a long overdue resolution of this matter, one consistent with the core principles asserted by the many courts that have reviewed this matter.

DATED: June \_\_\_\_\_, 2006

Respectfully submitted,

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