



February 21, 2007

Honorable Justices of the
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797
Sent via UPS Next Day Air

**Re: Amicus Curiae letter from The American Legion and The American Legion
Department of California opposing Petition for Review in *Paulson v.
Abdelnour, et al.*, Case No. S149386.**

Dear Justices of the California Supreme Court:

Pursuant to Appellate Rule 8.500(g), The American Legion and The American Legion Department of California submit this amicus curiae letter opposing Plaintiff Philip Paulson's Petition for Review filed with this Court in the above-captioned matter.

Interest of The American Legion and The American Legion Department of California

The American Legion was chartered by Congress in 1919 as a patriotic, mutual-help, wartime veterans organization. The American Legion is a veterans and community service organization which now numbers over 2.6 million members – men and women – in nearly 14,500 American Legion Posts worldwide, including Puerto Rico, France, Mexico, and the Philippines. Since its inception, The Legion has maintained an ongoing concern and commitment to veterans and their families. The Legion was instrumental in creation of the U.S. Veterans Bureau, now known as the Department of Veterans Affairs, and has continued to be an advocate for veteran's rights. In 1935, The American Legion established Boys State for the advancement of democratic and patriotic ideals to counter the Fascist-inspired Young Pioneer Camps.

The American Legion Department of California is one of fifty-five Departments of the American Legion. The Department represents some 130,000 Legionnaires organized in Posts, Districts, and Areas.

Both the Department and the American Legion have a special interest in this litigation because of their historic and ongoing support of veterans benefits and their defense of veterans memorials throughout the Nation. And the Department of California has a special interest in this litigation, as the first department to have established, through a working relationship with the Alliance Defense Fund, a Defense of Veterans Memorials Project, with the express mission of defending veterans memorials throughout California, including the Mt. Soledad National War Memorial.

The American Legion continues its work today helping veterans survive economic hardship and secure government benefits. It also promotes social stability and well-being for those that have honorably served our Nation's common defense. The Legion is dedicated to preserving American values, promoting patriotism and encouraging self-less service and sacrifice among the Nation's youth. In short, The American Legion seeks to honor the sacrifice for our country of those who have gone before us, support those who continue to sacrifice for our country today, and prepare those who will be called to sacrifice for all of us in the future.

Overview

In December 2004, Congress passed legislation designating the Mt. Soledad Veterans Memorial "as a national memorial honoring veterans of the United States Armed Forces." (Consolidated Appropriations Act, 2005, Pub.L. No. 108-447, Div. J., § 116 (a) (Dec. 8, 2004) 118 Stat. 2809 (hereafter "Public Law No. 108-447").) In so doing, Congress authorized the Department of the Interior to accept a transfer of the Memorial property from the City of San Diego. (*Id.* at § 116(b).)

Following a public hearing, the San Diego City Council rejected a resolution that would have transferred the Memorial property to the federal government. (Appellate Court Opinion [hereafter "Opinion"], p. 9.¹) Shortly thereafter, a referendary petition was submitted to the City Council calling upon it to reconsider its decision, which it did. (*Id.* at p. 9.) The City Council voted, for a second time, against a resolution transferring the Memorial property to the federal government. Instead, it voted to place Proposition A on a special-election ballot, asking San Diego voters to decide whether to transfer the Memorial property. (*Id.* at pp. 9-10.) Proposition A passed by 76 percent of the vote. (*Id.* at p. 13.)

Philip Paulson (hereafter "Petitioner") challenged the constitutionality of Proposition A and the land transfer in court. The trial court found that Proposition A and the transfer of the Memorial property unconstitutional preferences for religion in violation of Article I, Section 4 of the California Constitution. (*Id.* at p. 15.) The Appellate Court reversed, concluding that the ballot measure and the Memorial property transfer did not violate the First Amendment Establishment Clause or the California Constitution. (*Id.* at p. 23.) Petitioner now seeks this Court's review.

Argument

Petitioner seeks review of this case based primarily on his contention that the Appellate Court's decision conflicts with precedent from several courts, including this one. His argument focuses on how the Appellate Court applied the first-prong of the *Lemon* test² – whether the challenged government action has a secular purpose – which is used to evaluate claims under

¹ A copy of the Opinion by the Court of Appeal, Fourth Appellate District (hereafter "Appellate Court") is attached to the Petition for Review as Exhibit B.

² Under *Lemon v. Kurtzman* (1971) 403 U.S. 602, a challenged governmental action must meet three requirements: (1) it must have a secular purpose; (2) its primary effect must neither advance nor inhibit religion; and (3) it must not create an excessive entanglement of government and religion. (*Id.* at pp. 612-13.)

both the First Amendment's Establishment Clause and Article I, Section 4 of the California Constitution. (Opinion at p. 24; *East Bay Asian Local Development Corp. v. State of California* (2000) 24 Cal.4th 693, 718-19.)

I. The Court of Appeal properly scrutinized the government's purpose under *Lemon*.

The inquiry into government purpose is a limited one. The government must offer a genuine secular purpose, not a sham. (*McCreary County v. American Civil Liberties Union of Kentucky* (2005) 125 S.Ct. 2722, 2735.) To determine whether a proffered reason is genuine, courts should examine the text, legislative history, and implementation of the act. (*Id.* at p. 2734.) But they should avoid engaging in "judicial psychoanalysis of a drafter's heart of hearts" or attempting to decipher the "veiled psyche of government officers." (*Id.* at pp. 2734-35.) A government act should only be struck down if there are external signs that would lead an objective observer to the "commonsense conclusion that a religious objective permeated the government's action." (*Id.* at p. 2735.)

A. The Appellate Court looked to both the language of Proposition A and the context leading up to its passage in upholding its constitutionality.

Turning to the challenged act in this case, the Appellate Court concluded that the City Council's purpose in putting Proposition A before the voters was to "ascertain[] the will of the people with regard to the federal government's offer" to take control of the Mt. Soledad property and leave the fate of the property to the democratic process. (Opinion at p. 33.) Petitioner does not (and could not) dispute that this is a legitimate secular purpose.

To reach this conclusion, the Appellate Court first looked at the language of Proposition A. It is undisputed that Proposition A is facially neutral. (*See* Petition for Review at p. 6 [arguing that "the Appellate Court in this case refused to look past the facially neutral statute...."].) Moreover, Public Law 108-447 does not require the federal government to keep the Cross as part of the memorial. (*Id.* at pp. 30-31.) Neither the City nor the Mt. Soledad Memorial Association (which is charged with the continued maintenance of the memorial) had any means of preventing the government from tearing down the Cross.

While significant, this does not end the inquiry. (*See, e.g., McCreary County, supra*, 125 S.Ct. at pp. 2739-40 [Court relied on County's actions leading up to most recent Ten Commandments display in determining it had no secular purpose]; *Wallace v. Jaffree* (1985) 472 U.S. 38, 59 [inferred religious purpose from a change of wording in a statute].) As noted above, Proposition A may still be invalidated, but only if there is external evidence clearly showing a religious objective.

So the Appellate Court also looked to the context surrounding the passage of Proposition A, just like the U.S. Supreme Court did in *McCreary*. The Appellate Court noted that the city council passed up two separate opportunities to transfer the Mt. Soledad property to the federal government on its own. (Opinion at p. 32.) When Public Law 108-447 was passed, the federal government offered to accept a transfer of the Mt. Soledad property, but the city council refused to do so. (*Ibid.*) After the referendary petition was presented to the council, it rejected another resolution to transfer the property. (*Ibid.*)

Ultimately, the City Council was not acting to save the Cross. To the contrary, it continually put the fate of the Cross into the hands of others—first the voters and then the federal

government. This was nothing more than “an act of deference to political reality.” (*Id.* at p. 33.) And the City Council was validated by the Appellate Court’s examination of both the language of the proposition and the surrounding context. This fully satisfies the constitutional requirements under the *Lemon* test. (*McCreary County, supra*, 125 S.Ct. at pp. 2735-36.)

B. The Petitioner offers no evidence that would justify overturning the Appellate Court’s decision.

In response, the Petitioner accuses the Appellate Court of “turn[ing] a blind eye” to the statements of the Mayor and two City Council members in support of the Memorial during their vote to send Proposition A to voters. (Petition at p. 24.) But this Court has advised against relying on individual statements in determining a government body’s purpose: “We have frequently stated, moreover, that the statements of an individual legislator, including the author of a bill, are generally not considered in construing a statute, as the court’s task is to ascertain the intent of the Legislature as a whole in adopting a piece of legislation. (*Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1062-63 [citing cases].) Given the strong evidence demonstrating that the City’s purpose was secular (discussed above), the Appellate Court properly followed this Court’s direction in not treating these individual statements as dispositive of the entire City Council’s purpose.

The Petitioner also contends that the Appellate Court disregarded “smoking gun evidence” of an improper purpose: a letter from a Christian legal organization asking two Congressmen to take steps to “save the Cross.” (Petition at p. 22.) The Petitioner claims this letter represents the federal government’s religious purpose in passing Public Law 108-447. But this is a letter written by a private organization. Public Law 108-447 was passed by both the Senate and the House of Representatives, and signed into law by the President. Yet this letter was only sent to two members of the House. (*Id.* at p. 22.) There is no evidence that the letter was mentioned anywhere in the legislation itself, in its legislative history, or in the congressional debate. Nonetheless, the Petitioner wants to uphold this letter as representing the motive of each member of Congress and the President. The Appellate Court was correct in not giving this argument any credence.

II. Upholding the land transfer does not contradict any previous court decision regarding the Mt. Soledad Cross.

The Petitioner next argues that the Court of Appeal’s decision contravenes the Ninth Circuit’s en banc decision in *Paulson v. City of San Diego* (9th Cir. 2002) 294 F.3d 1124. (Petition at pp. 6-7.) In *Paulson*, the Ninth Circuit considered whether the City’s sale of the Memorial property to a private organization was constitutional. The key question was whether “the manner in which the City structured the sale *directly, immediately, and substantially* aided the sectarian purpose of preserving the cross.” (294 F.3d at p. 1132.) The court answered in the affirmative, only because “the structure of the sale provided a financial incentive to maintain the cross.” (*Ibid.*) As the court explained, the sale was done through a bidding process, and those bidders who wanted to keep the cross were able to offer a higher bid because they did not have to factor in the cost of removing the cross into their bids. (*Id.* at p. 1133.) This created an incentive to keep the cross and was therefore unconstitutional. (*Ibid.*)

No such incentive exists here. This case involves a land transfer to the federal government, not a land sale. Since there was not a bidding process involved, the transfer does not create the any incentive – financial or otherwise – to keep the cross. Moreover, as the Appellate Court explained, nothing in the transfer agreement requires the federal government to maintain the cross at all. The City is giving up all of its rights and control over the entire Memorial.

Petitioner cites *Paulson* for the proposition that, because the presence of the Cross on City property had been held to violate the California Constitution, any action that might preserve it (such as a land transfer) would be *per se* unconstitutional. (Petition at p. 6.) This is an overly broad reading of the case. When *Paulson* was decided, the court acknowledged that it had already held that the presence of the cross violated the California Constitution in *Ellis v. City of La Mesa* (9th Cir. 1993) 990 F.2d 1518. (294 F.3d at p. 1132.) Under Petitioner’s argument that any transfer of the land is unconstitutional, that should have ended the inquiry in *Paulson*. Instead, the Ninth Circuit explained that it still had to decide whether “the manner in which the City structured the sale *directly, immediately, and substantially* aided the sectarian purpose of preserving the cross.” (*Ibid.*) The court still evaluated the constitutionality of the land transfer. It did not say *any* land transfer was unconstitutional, only those that created a financial incentive to keep the cross. (*Ibid.*)

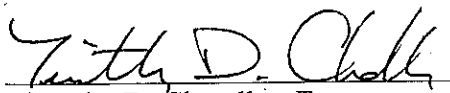
This also demonstrates that the Petitioner’s reliance on *Ellis* and *Murphy v. Bilbray* (S.D.Cal. 1991) 782 F.Supp. 1420, is misplaced. Both cases held that the presence of the Mt. Soledad Cross on City property violated the California Constitution’s No Preference Clause. (*Ellis, supra*, 990 F.2d at p. 1528; *Murphy, supra*, 782 F.Supp. at p. 1438.) However, as explained above, this does not automatically invalidate any effort to transfer the land to another owner. The constitutionality of the transfer itself must be independently decided, which the Appellate Court properly did. Therefore, the Appellate Court’s Opinion does not contradict any of the previous decisions surrounding the Mt. Soledad Cross, and this Court should allow the Opinion to stand.

Conclusion

Veterans memorials exist to honor those who sacrifice their lives for something greater than themselves, and serve as rallying points for survivors and others to remember their sacrifice and find solace, peace, and reason for such loss. Historically, religious imagery is used to communicate these messages. It is disheartening and distressing to think that our Nation’s veterans memorials may be gutted because there are those who ignore this history. If we cannot publicly acknowledge this country’s religious history and heritage to honor those who have made the ultimate sacrifice, how can we as a Nation ever look into the face of youth to call upon it to once again return to the alter of freedom and offer the same sacrifice given by generations before?

No memorial, however brilliantly conceived, can represent the sentiments of all those it means to serve: But the Constitution should not be misused as a tool to reduce such sentiments to the lowest common denominator of sadness and gloom. Memorials exist not just to convey that the youth perished; most people crave more than that. They crave an eternal hope that those who perished did so for something greater than themselves.

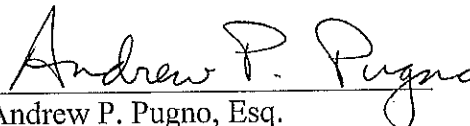
Respectfully submitted,



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Proof of Service

I am over the age of 18 years and not a party to the within action. My business address is 101 Parkshore Drive, Suite 100; Folsom, California 95630.

I served the document described as:

**AMICUS CURIAE LETTER FROM THE AMERICAN LEGION AND
THE AMERICAN LEGION DEPARTMENT OF CALIFORNIA
OPPOSING PETITION FOR REVIEW IN
PAULSON V. ABDELNOUR, ET AL., CASE NO. S149386**

on the interested parties in this action:

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I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct. Executed at Folsom, CA.

Michele L. Magnaghi
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