



November 21, 2006

Clerk of the Court
United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Via UPS Next Business Day Delivery

Re: *Paulson, et al. v. City of San Diego, et al.*
Consolidated Case Nos. 06-55769 and 06-55919

To the Honorable Court:

Pursuant to this Court's Order dated October 24, 2006, *amici curiae* The American Legion and The American Legion Department of California file this letter brief regarding the mootness issue in support of the City of San Diego and Proposed Intervenor San Diegans for the Mt. Soledad National War Memorial.

I. Introduction

The sole question before this Court on appeal is whether the district court properly enjoined the City of San Diego from displaying the Mount Soledad National War Memorial cross on city property. The cross is no longer on city property; the property has been transferred to the federal government – which is not a party to this action. Thus, the injunction is unenforceable, leaving the Plaintiff with no legally cognizable interest in this appeal. The entire case is therefore moot. Proposed Intervenor San Diegans for the Mt. Soledad National War Memorial effectively articulated this argument in its letter brief, with which *amici* fully concur. As a result, *amici* demonstrate below that the most appropriate course of action for this Court is to vacate the lower court decision and remand it with direction that it be dismissed.

II. This Court should follow the “established practice” of vacating the lower court’s judgment and remanding for dismissal.

When a case is mooted while on appeal, the appellate court is not stripped of all jurisdiction over the case. 28 U.S.C. § 2106 gives appellate courts jurisdiction to vacate any judgment brought before them for review, and allows courts to remand the case and direct the entry of any judgment “as may be just under the circumstances.” When a civil case from a federal court has become moot while on appeal, the “established practice” is to reverse or vacate the judgment and remand with a direction to dismiss. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). Indeed, this course of action “has been followed in countless cases in [the Supreme] Court.” *Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 92 (1979).

Vacatur “clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance.” *Munsingwear*, 340 U.S. at 40. As explained below, vacatur of the district court’s decision is particularly appropriate in this case. Accordingly, the decision should be vacated and this Court should remand the case to the District Court with instructions to dismiss the case as moot. See *Chemical Producers and Distributors Ass’n v. Helliker*, 463 F.3d 871, 880 (9th Cir. 2006) (ordering that disposition of a moot case); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1052 (9th Cir 2006) (same).

A. Vacatur is necessary whenever the appellant does not intentionally moot the case.

Determining whether vacatur is appropriate is an equitable question, and the primary factor is the fault of the parties in causing the appeal to become moot. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25-26 (1994). If the party seeking relief does not intentionally cause the mootness, vacatur is appropriate. “A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment.” *Id.* at 25.

Vacatur is appropriate here because Congress transferred the title of the property at issue to the federal government, making any injunctive relief against the City of San Diego meaningless. This event occurred by happenstance; Congress’s action could never be considered a deliberate effort by the Appellants to escape the consequences of the decision below.

Courts will also occasionally take into account the public interest in

maintaining judicial precedent when deciding when vacatur is appropriate. *See, e.g., id.* at 26-27. That is not necessary here. The precedential value of a district court's decision is, of course, limited to its persuasive effect. So the impact of vacating it is minimal. By contrast, when an appellate decision is vacated, it eliminates binding precedent for an entire circuit. Thus, this factor is important when considering whether to vacate an appellate decision. But it will rarely, if ever, justify deviating from the standard practice of vacating a district court's decision. *Russman v. Bd. of Educ. of Enlarged City Sch. Dist. of City of Watervliet*, 260 F.3d 114, 122 (2d Cir. 2001) (explaining that this factor carries "considerably less weight" when an appellate court decision is not being vacated). Accordingly, vacatur is appropriate in this case.

B. Vacatur is also appropriate because the current controversy is already being litigated in another case.

Although this case is now moot, the Plaintiff is litigating the issue of whether the Mount Soledad National War Memorial cross may be displayed on public property in another case. Plaintiff Paulson recently filed *Trunk v. City of San Diego*, No. 06-CV-1597 (S.D. Cal. filed Sept. 8, 2006),¹ which has been consolidated with *Jewish War Veterans of the United States of America v. Rumsfeld*, No. 06-CV-1728 (S.D. Cal. filed Aug. 24, 2006). There, the plaintiffs are challenging the constitutionality of the land transfer to the federal government, as well as the constitutionality of displaying the cross on public property. Indeed, the plaintiffs are requesting as relief that the cross be moved "at the expense of individual citizens who believe that the Latin cross should be preserved, to an appropriate non-governmental site." *See* Complaint for Declaratory and Injunctive Relief, p. 19. So the issue will still be litigated and ruled upon under the current facts with appropriate parties in *Trunk* and *Jewish War Veterans*.

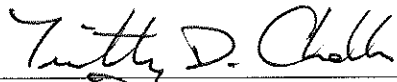
This tilts the equities even further in favor of vacatur. Vacatur will ensure that the rights of all parties are preserved and that no one will be prejudiced by a decision that could not be reviewed. *Munsingwear*, 340 U.S. at 40. As such, the equities favor vacating the lower court's decision.

¹ As this Court is already aware, Plaintiff Paulson died on October 25, 2006. Mr. Paulson is one of two plaintiffs in the *Trunk* case. The other, Mr. Trunk, has moved in the District Court to be added as a plaintiff in this case.

III. Conclusion

It is indisputable that the only remedy sought by the Plaintiff in this action – injunctive relief against the City of San Diego – cannot be obtained because the City no longer owns the land at issue. Thus, there is no live case or controversy, and the case is moot. Therefore, this Court should follow the established practice of federal appellate courts and remand the case to the District Court with instructions to dismiss the case as moot.

Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that two (2) copies of the foregoing supplemental letter brief of *amici curiae* was this day served on all counsel of record by placing the documents in the United States Mail, postage prepaid, and sent to their last known addresses as follows:

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(Cont'd on following page)

I also hereby certify that an original and fifteen (15) copies of the foregoing supplemental letter brief of *amici curiae* were this day mailed to the clerk by placing the documents in a sealed UPS Express box and affixing a pre-paid airbill addressed as set forth below, and causing the box to be delivered to a UPS agent for next business day delivery.

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Folsom, CA this 21st day of November, 2006.



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