



Summary of the Mount Soledad Opinion
***Trunk v. City of San Diego*, Case No. 06-cv-1597-LAB (July 29, 2008)**

The United States District Court for the Southern District of California held that the federal government’s acquisition and operation of the Mount Soledad Veteran’s Memorial in San Diego, California—including its commemorative cross—is consistent with the Establishment Clause of the First Amendment. In an opinion issued by Judge Larry Alan Burns, the court granted the government’s motion for summary judgment and dismissed the case. On several occasions, the court cited the *amici curiae* brief filed by the American Center for Law and Justice (“ACLJ”), Advocates for Faith and Freedom, and 33 Members of Congress in support of the federal government’s motion for summary judgment (“ACLJ Brief” or “Congressional Amici”). The court’s well-reasoned opinion provides strong support for the longstanding tradition of using crosses among other commemorative symbols to honor fallen military service personnel.

Background

There has been a memorial cross at Mount Soledad for almost a century. A cross was first placed on Mount Soledad in 1913, and a replacement cross was placed there in 1923. After the replacement cross was blown down in 1952, the Mount Soledad Memorial Association placed a 29-foot tall cross there in 1954.

In 1989, the City of San Diego was sued in federal court on a claim that the presence of the cross on the City’s property violated the California Constitution. The United States Court of Appeals for the Ninth Circuit held in 1993 that the presence of the cross within the Memorial violated the California Constitution. The City sold part of the parkland surrounding the Memorial to the Association in a negotiated sale, but the district court held that the sale violated the California Constitution. As a result, the City expanded the amount of parkland available for sale and conducted a competitive bid process. The Association was the highest bidder and spent over one million dollars improving the Memorial by adding bollards, pavers, a flagpole, an American flag, and walls of thousands of individual plaques to the Memorial.

In 2002, the Ninth Circuit held that the City’s various attempts to address the court’s concerns through a sale of the property did not comply with the California Constitution. In December 2004, Congress designated the Mount Soledad Veterans Memorial “as a national

memorial honoring veterans of the United States Armed Forces.” In July 2005, the voters of San Diego overwhelmingly approved a ballot proposition authorizing the City to transfer the Memorial to the federal government. Shortly thereafter, however, a state Superior Court judge held that the transfer to the federal government violated the California Constitution.

In May 2006, while the state case was pending on appeal, the district judge in the federal case ordered the City to remove the Memorial’s cross within 90 days. After the Ninth Circuit declined to stay this order, Supreme Court Justice Kennedy issued a stay of the court’s order in July 2006. In August 2006, Congress acquired the Memorial through eminent domain in order to ensure its preservation. Thereafter, the existing federal lawsuit against the City of San Diego was dismissed because it had become moot, and the California Court of Appeals reversed the Superior Court judge’s decision regarding the San Diego ballot proposition.

The Jewish War Veterans of the United States of America and several individuals represented by the American Civil Liberties Union brought a lawsuit challenging Congress’ taking of the Memorial and the presence of the cross on federal property under the Establishment Clause. In December 2007, the ACLJ filed its *amici curiae* brief in support of the federal government’s motion for summary judgment on behalf of 33 Members of Congress: Representatives Todd Akin, Gresham Barrett, Rob Bishop, Dan Burton, John Campbell, Eric Cantor, Steve Chabot, Michael Conaway, Barbara Cubin, John Culberson, John Doolittle, Tom Feeney, Virginia Foxx, Scott Garrett, Phil Gingrey, Louie Gohmert, Steve King, Jack Kingston, John Kline, Kenny Marchant, Patrick McHenry, Mike McIntyre, Gary Miller, Marilyn Musgrave, Sue Myrick, Randy Neugebauer, Steve Pearce, Joseph Pitts, Dana Rohrabacher, Tom Tancredo, Todd Tiahrt, Dave Weldon, and Lynn Westmoreland.

The *amici curiae* brief was filed in conjunction with Advocates for Faith and Freedom, a California-based religious liberties firm. This brief was the latest in a series of ACLJ briefs filed in support of the Mount Soledad Veterans Memorial. *See City of San Diego v. Paulson*, Sup. Ct. No. 05-A-1234 (Kennedy, Circuit Justice, June 30, 2006); *Paulson v. City of San Diego*, No. 06-55769 (9th Cir. June 12, 2006, July 26, 2006, and Nov. 17, 2006); *Paulson v. Abdelnour*, No. S149386 (Cal. Feb. 1, 2007); *Paulson v. Abdelnour*, No. D047702 (Cal. Ct. App. July 24, 2006).

Opinion

The court began by holding that, under the Ninth Circuit’s cases, the Plaintiffs had standing to challenge the continued presence of the Memorial’s cross on federal land. Slip op. at 5-7. Turning to the merits, the court stated that *Lemon v. Kurtzman* and *Van Orden v. Perry* were the most relevant Supreme Court cases. *Id.* at 7-8. The court held that the Plaintiffs “must show either that Congress acted unconstitutionally when it acquired the memorial, or that the federal government is violating the Constitution by preserving and maintaining the memorial in its present condition.” *Id.* at 10.

The court stated that, “[w]hile Plaintiffs offer snippets of evidence showing individual legislators made isolated statements arguably suggesting their own religious motives for supporting the bill, there is simply no evidence that Congress **as a whole** was so motivated.” *Id.* at 14 (citations omitted). The court used a quote from a Supreme Court opinion found on page 9 of the ACLJ’s brief:

Floor statements from two Senators cannot amend the clear and unambiguous language of a statute. We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text.

Id. (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457 (2002)); *see also* ACLJ Brief at 9 (quoting *Barnhart*, 534 U.S. at 457). The court then cited the ACLJ’s brief, stating:

In their brief, the 33 Congressional *Amici* take pains to separate themselves from individual legislators’ remarks Plaintiffs now suggest demonstrate the thinking of the entire Congress. For reasons outlined in the text, the Court must largely ignore the statements of individual legislators respecting their own motives for either supporting or opposing particular legislation.

Slip op. at 14, n.12.

Moreover, the court stated that “Plaintiffs infer a religious motive from Congress’ expression of dissatisfaction with the protracted litigation, and what it apparently perceived as the undemocratic intervention of the state superior court invalidating a runaway vote by San Diego citizens in favor of donating the memorial to the federal government.” *Id.* at 15. The court then cited the ACLJ’s brief:

The Congressional *Amici* particularly associate themselves with this stated purpose:

Like all democratically-elected bodies, Congress has a great interest in giving effect to the will of the people on issues of public importance. The widespread support among San Diego voters for the federal government’s operation of the Memorial cut across religious, political, and cultural lines.

Id. at 15, n.13 (citing ACLJ Brief at 4).

In discussing the Argonne Cross and the Canadian Cross of Sacrifice located at Arlington National Cemetery, the court noted that photographs of the monuments were identified in the ACLJ’s brief. *Id.* at 22, nn. 20-21 (citing ACLJ Brief at 9, n.8). The concluding paragraph of the ACLJ’s brief, which the court was referring to, stated:

[T]his Court’s resolution of the case at bar will affect the legal landscape governing the countless veterans memorials and cemeteries owned and operated by the federal government as well as the state and local governments. While it is common for individual graves to be marked with a symbol reflecting the person’s religious faith, the memorial cross has not lost its place as a universal symbol of remembrance and respect that is often used to honor people of all religions. Numerous publicly owned cemeteries and memorials honoring veterans of the Civil War, World Wars I and II, the Korean War, the Vietnam War, the War on Terrorism, and other armed conflicts include memorial crosses similar to Mount Soledad’s. For example, the Argonne Cross and the Canadian Cross of Sacrifice have stood at Arlington National Cemetery for decades as a tribute to servicemen killed in World War I.⁸ . . . Given the ubiquity of commemorative crosses at cemeteries and veterans memorials nationwide, this Court’s decision would likely have a wide-ranging impact beyond southern California.

ACLJ Brief at 9. The court again referred to this paragraph of the ACLJ’s brief on the final page of its opinion:

The Congressional *Amici* have also raised concerns that an adverse decision would imperil numerous publicly owned and controlled veterans’ memorials and cemeteries, creating a wide-ranging impact. (Brief of Congressional *Amici* at 9:3-20). This is a valid concern, bearing in mind the large number of crosses in military memorials. In view of the Court’s conclusion that the Mt. Soledad Veterans Memorial does not violate the Establishment Clause, the Court need not address this point.

Slip op. at 36 (citation omitted).

One of the Plaintiffs’ key arguments was that “the federal government’s operation of the Memorial violates the Establishment Clause due, in part, to the ‘high profile and avowedly religiously inspired efforts by Christian-affiliated organizations’ to preserve the Memorial.” ACLJ Brief at 7 (citation omitted). The ACLJ’s brief emphasized that, “[j]ust as the Establishment Clause does not disqualify priests, rabbis, and other members of the clergy from holding public office, it does not give religious citizens an unwanted ‘King Midas touch’ rendering the laws that they actively support unconstitutional.” *Id.* at 8. The court replied:

The most the Court can deduce from Plaintiffs’ evidence that religious lobbying, appeals to government officials, public speeches (both religious and otherwise), public prayer, and various other forms of protected activities were

⁸ Arlington National Cemetery, *Argonne Cross*, http://www.arlingtoncemetery.org/visitor_information/Argonne_Cross.html; Arlington National Cemetery, *Canadian Cross of Sacrifice*, http://www.arlingtoncemetery.org/visitor_information/Canadian_Cross.html.

occurring up to the time Public Law 109-272 was enacted is that much of the support for the statute was religiously motivated. This is unremarkable; lobbying and public advocacy by religious and charitable organizations is altogether common, and in any event cannot be regarded as “causing” Congress to take the memorial.

Slip op. at 11. Significantly, the court stated, “[t]hat some person or group might be uncomfortable with the presence of the cross as part of the veteran’s memorial is not enough to require its removal. . . . It would be asking the impossible to require government to ensure no one will be offended before taking property containing religious elements in order to preserve it.” *Id.* at 28, n.25.

Another theme emphasized in the ACLJ’s brief was that “Plaintiffs’ exclusive focus upon the Memorial’s commemorative cross as if it were the only property the federal government acquired through P.L. 109-272 is misplaced.” ACLJ Brief at 7. The court agreed with this point in holding that expert testimony offered by the Plaintiffs improperly “circumscribe[d] its focus on an individual element of the memorial—the cross—rather than looking at the memorial as a whole as the case law requires.” Slip op. at 23. The court declared that, “[w]hen the cross is considered in the context of the larger memorial and especially the numerous other secular elements, the primary effect is patriotic and nationalistic, not religious.” *Id.* at 24. The court concluded that

the Mt. Soledad Veterans Memorial passes the effect test because: the cross has a broadly-understood ancillary meaning as a symbol of military service, sacrifice, and death; it is displayed along with numerous purely secular symbols in an overall context that reinforces its secular message; and it is historically significant. As a result, the specter of government endorsement of religion or favoring a religion is not apparent, let alone obvious and primary.

Id. at 25-26.

Regarding the purpose for acquiring the Memorial, the court held that “[f]or the United States to recognize the service and sacrifice of its war veterans by preserving a memorial in their honor is laudable and unquestionably secular.” *Id.* at 10. In addition, “Congress’ findings are facially non-religious, and relate logically to the law’s secular statutory purpose—honoring our country’s fallen war veterans by ‘preserv[ing] a historically significant war memorial.”” *Id.* at 12. In considering the effect of operating the Memorial, the court concluded that “precedents dealing with public displays of crosses in the Establishment Clause context suggest Latin crosses should **not** be assumed to be primarily or exclusively religious symbols.” *Id.* at 18. The court noted that “the generic use of crosses as grave markers, particularly for the graves of fallen service members. . . . [is] well-attested to in literature, cinema and the visual arts.” *Id.* at 21, n.19. The court concluded by granting the government’s motion for summary judgment and dismissing the case.