



January 4, 2011

**Summary of the Mount Soledad Opinion
Trunk v. City of San Diego, Case No. 08-56415
U.S. Court of Appeals for the Ninth Circuit**

The United States Court of Appeals for the Ninth Circuit issued an opinion holding that the federal government's acquisition and operation of the Mount Soledad Veterans Memorial in San Diego, California—including its commemorative cross—violates the Establishment Clause of the First Amendment. The decision is deeply flawed in many respects, and the government will likely ask the Supreme Court to hear the case.

The American Center for Law and Justice (ACLJ) filed an *amici curiae* brief in support of the government on behalf of itself, 25 members of Congress, and Advocates for Faith and Freedom, a California-based religious liberty law firm, which served as co-counsel in the case.

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 43-foot tall cross on park land owned by the City of San Diego 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 park land 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 park land 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 in the United States District Court for the Southern District of California 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 an *amici curiae* brief in support of the federal government's motion for summary judgment on behalf of itself, 33 Members of Congress, and Advocates for Faith and Freedom. The brief was the latest in a series of ACLJ briefs filed in support of the Mount Soledad Veterans Memorial.¹

In July 2008, the court held that the federal government's acquisition and operation of the Memorial is consistent with the Establishment Clause. 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 ACLJ's *amici curiae* brief. The plaintiffs appealed this decision to the United States Court of Appeals for the Ninth Circuit.

Summary of the Opinion

The Ninth Circuit rejected the plaintiffs' argument that the federal government had acted with a primarily religious purpose, holding that "Congress's acquisition of the Memorial was predominantly secular in its goals." Slip op., at p. 192. Regarding the Memorial's primary effect, the court considered "whether 'it would be objectively reasonable for the government action to be construed as sending primarily a message of either endorsement or disapproval of religion.'" *Id.* at 195-96 (citation omitted).

¹ 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).

The court found it highly significant that the Memorial consisted solely of a cross from 1913 through the late 1980s when the legal controversy began, at which time a plaque was added designating the site as a war memorial. *Id.* at 181. The fact that the Memorial's other items were "of recent vintage" in comparison to the Latin crosses themselves was significant to the court, *id.* at 209, especially in light of previous cases from the Ninth Circuit and other courts declaring that the Latin cross is "the preeminent symbol of Christianity." *Id.* at 197.

In the court's view, the objective message of the Memorial's cross has been a sectarian Christian message throughout its history, relying on a statement at the 1954 dedication that the cross would be "a reminder of God's promise to man of everlasting life and of those persons who gave their lives for our freedoms" as well as other examples of Christian expression or activity related to the Memorial. *Id.* at 181, 212-16. The court also stated that the presence of pervasive anti-Semitism in the community the Memorial was located in from the 1920s to 1970 was evidence reinforcing the message that the Memorial was not intended to honor Jewish veterans. *Id.* at 216-18.

In addition, the court stated,

this war memorial—with its imposing Cross—stands as an outlier among war memorials, even those incorporating crosses. Contrary to any popular notion, war memorials in the United States have not traditionally included or centered on the cross and, according to the parties' evidence, there is no comparable memorial on public land in which the cross holds such a pivotal and imposing stature, dwarfing by every measure the secular plaques and other symbols commemorating veterans.

Id. at 181-82.

The court relied heavily on two expert declarations offered by the plaintiffs—which the trial court found unconvincing—stating that "the cross is not commonly used as a symbol to commemorate veterans and fallen soldiers in the United States." *Id.* at 200. The expert alleged that crosses in any form were virtually non-existent in American memorials prior to the middle of the 20th century, and even then they primarily appeared as emblems on the individual headstones of Christian service members. *Id.* at 201-02. By contrast, the Mt. Soledad Veterans Memorial features a 43-foot tall Latin cross that, in the court's view, "physically dominates the Memorial." *Id.* at 208, n.18. The court concluded that the cross's physical stature and centrality within the Memorial indicated that the cross was intended to be emphasized as a sectarian religious symbol. *Id.* at 219-22. As such, the court sought to distinguish the Mt. Soledad Veterans Memorial from memorials found in Arlington National Cemetery, Gettysburg, and the Vietnam Veterans Memorial. *Id.* at 183, 204-07.