

**IN THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

PHILIP K. PAULSON,
Plaintiff-Appellee,

v.

CITY OF SAN DIEGO; MOUNT SOLEDAD
MEMORIAL ASSOCIATION, INC.,
Defendants-Appellants.

On Appeal from the Order of the United States
District Court for the Southern District of California
The Honorable Gordon Thompson, Jr., Presiding
United States District Court No. 89-0820GT

**BRIEF AMICI CURIAE OF THE AMERICAN CENTER FOR LAW AND JUSTICE,
ADVOCATES FOR FAITH AND FREEDOM, AND UNITED STATES REPRESENTATIVES
DUNCAN HUNTER, TODD AKIN, GRESHAM BARRETT, ERIC CANTOR, MICHAEL
CONAWAY, BARBARA CUBIN, JOHN CULBERSON, PHIL GINGERY, GIL GUTKNECHT,
JACK KINGSTON, JOHN KLINE, KENNY MARCHANT, PATRICK MCHENRY, MIKE
MCINTYRE, GARY MILLER, MARILYN MUSGRAVE, RANDY NEUGEBAUER, JOSEPH
PITTS, JIM RYUN, TODD TIAHRT, DAVE WELDON, AND LYNN WESTMORELAND IN
SUPPORT OF DEFENDANT-APPELLANT CITY OF SAN DIEGO'S URGENT
MOTION FOR A STAY PENDING APPEAL UNDER CIRCUIT RULE 27-3(b)**

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
AMERICAN CENTER FOR
LAW & JUSTICE
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890

ERIK M. ZIMMERMAN
AMERICAN CENTER FOR
LAW & JUSTICE
1000 Regent Univ. Dr.
Virginia Beach, VA 23464
(757) 226-2489

FRANCIS J. MANION
GEOFFREY R. SURTEES
AMERICAN CENTER FOR
LAW & JUSTICE
6375 New Hope Rd.
New Hope, KY 40052
(502) 549-7020

ROBERT TYLER
ADVOCATES FOR FAITH
& FREEDOM
32823 Highway 79 South
Temecula, CA 92592
(951) 252-8140

Counsel for Amici

CORPORATE DISCLOSURE STATEMENT

This disclosure statement contains the information required by F.R.A.P.

26.1. Amici the American Center for Law and Justice and Advocates for Faith and Freedom are non-profit corporations. They have no parent corporations and do not issue stock. Neither the amici nor their counsel represent or have appeared for any party in this case. The American Center for Law and Justice and Advocates for Faith and Freedom are the only law firms that are expected to appear for the amici in this case.

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JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
AMERICAN CENTER FOR
LAW & JUSTICE
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890

ERIK M. ZIMMERMAN
AMERICAN CENTER FOR
LAW & JUSTICE
1000 Regent Univ. Dr.
Virginia Beach, VA 23464
(757) 226-2489

FRANCIS J. MANION
GEOFFREY R. SURTEES
AMERICAN CENTER FOR
LAW & JUSTICE
6375 New Hope Rd.
New Hope, KY 40052
(502) 549-7020

ROBERT TYLER
ADVOCATES FOR FAITH
& FREEDOM
32823 Highway 79 South
Temecula, CA 92592
(951) 252-8140

Counsel for Amici

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INTEREST OF AMICI

This brief amicus curiae is submitted pursuant to a motion requesting leave to file. Amicus the American Center for Law and Justice (ACLJ) is a public interest law firm committed to ensuring the ongoing viability of constitutional freedoms in accordance with principles of justice. ACLJ attorneys have argued or participated as amicus curiae in numerous cases involving constitutional issues before the Supreme Court, this Court, and other federal and state courts. The ACLJ has been involved in dozens of cases nationwide relating to the recognition of America's religious heritage in public life. The proper resolution of this case is a matter of substantial concern to the ACLJ because, although the case deals primarily with the interpretation of California law, it will likely have a significant impact on veterans memorials across the nation. The ACLJ participated as an amicus when this Court first considered it in *Ellis v. La Mesa*, 990 F.2d 1518 (9th Cir. 1993).

The ACLJ also seeks to represent the interests of the many Americans nationwide who believe that symbols with some religious significance, such as a cross, should not be stripped from memorials designed to honor the service of our veterans. Recognizing the national importance of this case, 156,488 Americans—including 27,137 Californians—recently signed onto an ACLJ petition drive to preserve the Mt. Soledad Veterans memorial as it is.

Amicus Advocates for Faith and Freedom (AFF) is a California-based non-profit law firm dedicated to protecting religious liberty and family values. AFF seeks to ensure that the rich religious tradition that was so integral to the formation of Anglo-American law is not unduly excluded from the public arena in the United States, and especially in California. The resolution of this case is of great importance to AFF due to the impact it will have upon future cases involving religious freedom that will undoubtedly arise under the California Constitution.

Amici United States Representatives Duncan Hunter, Todd Akin, Gresham Barrett, Eric Cantor, Michael Conaway, Barbara Cubin, John Culberson, Phil Gingery, Gil Gutknecht, Jack Kingston, John Kline, Kenny Marchant, Patrick McHenry, Mike McIntyre, Gary Miller, Marilyn Musgrave, Randy Neugebauer, Joseph Pitts, Jim Ryun, Todd Tiahrt, Dave Weldon, and Lynn Westmoreland are currently serving members of the 109th Congress. These members of Congress strongly support the City of San Diego's decision to transfer the Mt. Soledad Veterans Memorial to the federal government so that it may be enjoyed by all Americans as a national memorial to honor veterans of the United States.

SUMMARY OF THE ARGUMENT

In all cases, “a balance must be struck between the somewhat inconsistent objectives of *accuracy* of adjudication and of *speed* of adjudication, a balance which varies with the type of cause and with the social interest involved.” *See*

People v. Williams, 152 Cal. Rptr. 892, 895 (Ct. App. 1979) (emphasis added). In the District Court’s most recent order in this case, however, accuracy in determining an appropriate resolution to the matter was pushed aside due to an obvious desire to bring this litigation to an end once and for all. The District Court’s order to enforce its earlier injunction stated, “the case has a long and torturous legal history” and added, “[i]t is now time, and perhaps long overdue, for this Court to enforce its initial permanent injunction forbidding the presence of the Mount Soledad cross on City property.” *Paulson v. City of San Diego*, No. 89-0820, Order at 2 (S.D. Cal. May 3, 2006). Regardless of the length of this litigation, there are new, important issues to be resolved given the designation by Congress of the Mt. Soledad Veterans Memorial “as a national memorial honoring veterans of the United States Armed Forces.” Consolidated Appropriations Act of 2005, 108 P.L. 447 (Dec. 8, 2004). Although courts should always ensure that their desire to bring an end to a particular case does not affect the appropriate balance between accuracy and speed, this is especially true when important issues of federal and state constitutional interpretation are involved.

The City of San Diego’s transfer of the Memorial to the federal government was a sensible way to remedy any remaining violations of the California Constitution, yet the District Court chose to order the City to remove the cross from the Memorial without any attempt to analyze the validity of this transfer. The

District Court was well aware of the fact that the transfer would ensure full compliance with the Court's order, and that the Plaintiff in this case initiated a lawsuit in the California state court system to challenge the validity of the transfer. *See Paulson v. Abdelnour*, San Diego Superior Ct. No. GIC-849667. Given the extraordinary nature of injunctive relief, a District Court is "able to modify, fashion or enforce appropriate equitable relief as the constitutional and property interests of the respective parties may be determined." *Ellis*, 990 F.2d at 1531 (Beezer, J., specially concurring). Rather than considering how the transfer of the Memorial to the federal government would adequately remedy the Plaintiff's claimed injury, however, the District Court blindly enforced its earlier injunction with no analysis of the issue. In light of these facts, this Court should issue a stay to allow for a more thorough review of whether the District Court adequately considered this Court's observation that "[n]o doubt there are several possible ways to cure this violation." *Paulson v. City of San Diego*, 294 F.3d 1124, 1134 (9th Cir. 2002).

I. This Court Should Issue a Stay Pending Appeal Because the City of San Diego Clearly Meets the Standard for the Issuance of a Stay.

A stay should be issued in this case given the City's likelihood of success on the merits and the lack of any serious hardship that a stay would impose upon the Plaintiff. Although stays are typically requested from the issuing court, the District Court here expressly stated: "Parties are directed that any stay of this order should

be sought from the Ninth Circuit Court of Appeals.” *Paulson v. City of San Diego*, No. 89-0820, Order at 2 (S.D. Cal. May 3, 2006).

The standard for evaluating stays pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction. *See Nevada Airlines, Inc. v. Bond*, 662 F.2d 1017, 1018 n.3 (9th Cir. 1980). During this analysis, the court considers 1) the movant’s probability of success on the merits; 2) whether the movant will suffer irreparable harm without the relief; 3) the balance of potential harms between the parties; and 4) whether the public interest favors granting the relief. *Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir. 1987). The “critical element” in deciding when a stay is justified is “the relative hardships to the parties.” *Benda v. Grand Lodge of Int’l Ass’n of Machinists*, 584 F.2d 308, 314-15 (9th Cir. 1978). This Court has repeatedly observed that “the greater the relative hardship to the moving party, the less strong need be the showing of probable success that is required.” *See id.* at 315. The public interest is especially strong in cases such as this one because the voters of San Diego have spoken directly about the subject matter of this litigation. *See Caribbean Marine Servs. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988). A stay, like a preliminary injunction, is “a device for preserving the status quo and preventing the irreparable loss of rights.” *Textile Unlimited, Inc. v. A. BMH & Co., Inc.*, 240 F.3d 781, 786 (9th Cir. 2001).

Within this Circuit, there are two interrelated legal tests for the issuance of a preliminary injunction which are “not separate” but rather represent “the outer reaches ‘of a single continuum.’” *Los Angeles Mem’l Coliseum Comm’n v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980). At one end of the continuum, the moving party is required to show both a probability of success on the merits and the possibility of irreparable injury. *Id.*; *see also Miss Universe, Inc. v. Flesher*, 605 F.2d 1130, 1134 (9th Cir. 1979). At the other end of the continuum, the moving party must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor. *Los Angeles Mem’l Coliseum Comm’n*, 634 F.2d at 1201; *Miss Universe*, 605 F.2d at 1134. This Court has defined “serious questions” as those which cannot be resolved at the preliminary injunction stage, those which are “substantial, difficult and doubtful,” making them fair ground for further litigation and “more deliberative investigation.” *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991); *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (en banc). At this end of the continuum, the moving party need not show a probability of success; it is sufficient to demonstrate a “fair chance of success on the merits.” *Gilder*, 936 F.2d at 422; *Republic of the Philippines*, 862 F.2d at 1362.

A stay should be issued here because this Court’s previous opinion specifically contemplated appellate review of the District Court’s determination of

a remedy. The Court stated: “We leave it to the parties and to the district court, *in the first instance*, to devise a remedy for the constitutional violation that we identified in *Ellis*.” *Paulson*, 294 F.3d at 1134 (emphasis added). This statement clearly implies that, although the parties and the District Court should make a preliminary determination of what remedy best meets the parties’ interests, this Court has the ability to review that determination for error. This Court should issue a stay to allow for a more thorough review of whether the District Court erred in ignoring significant changes in the facts, namely, the City’s decision to donate the Memorial to the federal government in order to alleviate any constitutional problems. The strong public interest in ensuring that an issue of the utmost importance—which has drawn the attention of Congress and many Americans nationwide—should be thoroughly examined by the courts dictates that this Court should issue a stay pending the appellate review process.

Importantly, at an earlier stage in this litigation, this Court issued a stay pending appeal in light of a very similar District Court opinion. The District Court stated in an earlier opinion:

As to each of these three cases, the court enters summary judgment for plaintiffs and issues a permanent injunction forbidding the permanent presence of each cross on the public property or imprimatur where it currently appears. *The court grants defendants three months within which to comply with its order and further directs that any stay of the order should be sought from the Court of Appeals.*

Murphy v. Bilbray, 782 F. Supp. 1420, 1438 (S.D. Cal. 1991) (emphasis added).

While the issues relevant at the time were pending on appeal before this Court, the Court issued a stay. *Ellis*, 990 F.2d at 1530, n.7 (Beezer, J., specially concurring).

The issuance of a stay in that circumstance was logical given the fact that there were important legal issues yet to be reviewed by this Court. Similarly, this Court should issue a stay to allow the City to fully present its argument that the District Court's decision to enforce its earlier injunction without any consideration of other possible remedies was erroneous, especially in light of the fact that the City had already agreed to transfer the property to the federal government.

II. The Trial Court Clearly Erred by Blindly Enforcing the Existing Injunction Without Considering the “Several Possible Ways to Cure [the] Violation” Previously Noted by this Court.

While the Plaintiff ultimately prevailed on the issue of whether San Diego may continue to own the Memorial while the cross is still part of it, the question of how that constitutional problem should (or must) be remedied still remains. Since the District Court first held that the City's display of the cross violated the California Constitution, the City has endeavored to remedy the constitutional problem in a lawful manner satisfactory to the citizens of San Diego. The Plaintiff seeks to short-circuit the appellate review process through the denial of a stay because his preferred remedy—removal of the cross from the Memorial at all costs, regardless of who owns the cross or land—differs from the one preferred by

the citizens of San Diego. Given this Court's statement that "[n]o doubt there are several possible ways to cure this violation," and that it is up "to the parties and to the district court" to initially propose a remedy, *Paulson*, 294 F.3d at 1134, the Plaintiff has no right to impose his own preferred remedy upon the City. The Plaintiff has cried foul throughout the entirety of this litigation, accusing the City of acting in bad faith, yet this Court has consistently rejected the Plaintiff's argument. *See* Section II.C, *infra*. This Court should issue a stay pending the appellate process because, given that the United States Congress and the City have already determined a way to remedy any remaining constitutional problems through the transfer of the property, the District Court erred by enforcing its original injunction to the public's detriment without any analysis of the transfer's validity.

- A. A stay of the District Court's order is highly advisable given that the City has already agreed to donate the Memorial to the federal government, and that transfer brought an end to any ongoing violation of the California Constitution.***

This court should issue a stay because the District Court wholly ignored the fact that the City's transfer of the Memorial to the federal government resolves any remaining problems under the California Constitution. In December 2004, Congress designated the Mt. Soledad Veterans Memorial "as a national memorial honoring veterans of the United States Armed Forces." 108 P.L. 447 (Dec. 8, 2004). The Secretary of the Interior was instructed to "accept, on behalf of the

United States, all right, title, and interest of the City [of San Diego] in and to the Mt. Soledad Veterans Memorial” in the event that the City offered to donate the Memorial. *Id.* In July 2005, the voters of San Diego overwhelmingly approved a ballot initiative (Proposition A) authorizing the City to transfer the Memorial to the federal government. As the City has explained:

The ordinance establishing the proposition . . . clearly demonstrates an express intent on behalf of the City Council to ascertain the will of the people with regards to the federal government’s offer to accept a donation of the Mt. Soledad property for the purpose of creating a national memorial honoring veterans of the United States Armed Forces, and not to ‘save the cross’ as erroneously alleged by Paulson.

Defendant City of San Diego’s Opposition to Plaintiff’s Motion to Enforce Injunction, to Enforce Settlement Agreement, and to Determine Ownership of the Cross at 7, *Paulson v. City of San Diego*, No. 89-0820 (S.D. Cal. Aug. 1, 2005) (citations omitted). In other words, the City’s transfer of the Memorial was a good faith attempt to ensure compliance with the decisions of this Court and the District Court.

It is clear that the City’s donation of the Memorial to the federal government would, in fact, alleviate the legal problems raised in this case. This Court has previously held that the City of San Diego violated the California Constitution by allowing the cross to be displayed on its own property, and two attempted sales of the property to the Association failed to cure the constitutional defect. The donation of the Memorial to the federal government would alleviate this

constitutional problem, however, because the federal government's operation of a park within California would not violate the California Constitution. By transferring the entire Memorial to the federal government, San Diego ensured that a violation of the California Constitution at that location would no longer be possible.

At the very least, the issuance of a stay in this case would help to ensure that the validity of the transfer to the federal government can be adequately examined by the California state courts. The Plaintiff's assertion that "[t]he fact that this Latin cross on this piece of property, surrounded by a veterans memorial and designated as a historical landmark is unconstitutional is the law of this case" is not entirely accurate. Plaintiff's Points and Authorities in Support of Motion to Enforce Injunction, To Enforce Settlement Agreement, and to Determine Ownership of the Cross at 11, *Paulson v. City of San Diego*, No. 89-0820 (S.D. Cal. July 18, 2005). Although it has already been determined that, under the California Constitution, the City of San Diego cannot retain the Memorial so long as the cross remains, no appellate court, federal or state, has considered the question of whether the City may validly transfer the Memorial to the federal government, or whether the federal government's acceptance of the Memorial would violate the Establishment Clause of the First Amendment. There are important issues yet to be considered given that the Memorial accepted by the

federal government in 2005 is markedly different from the one challenged by the Plaintiff in 1989. It is one thing for a trial court to hold that the United States Congress or a municipality violated the United States or California Constitution; it is another thing entirely for a court to render its decision without even acknowledging that Congress has enacted legislation which deals directly with the specific property at issue in the litigation. This Court should issue a stay to ensure that these important issues may be fully litigated.

B. The transfer of land is a well-established method of alleviating constitutional problems associated with symbols with religious significance.

San Diego's acceptance of the federal government's invitation to transfer the Memorial must be viewed in light of the fact that "[t]he divestment of property by a public entity is probably the most common and accepted practice when a public entity is faced with issues similar to those raised in this matter." Defendant City of San Diego's Opposition to Plaintiff's Motion to Enforce Injunction, to Enforce Settlement Agreement, and to Determine Ownership of the Cross at 7, *Paulson v. City of San Diego*, No. 89-0820 (S.D. Cal. Aug. 1, 2005). It is well established that "[a]bsent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion." *Freedom from Religion Found. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000); *see also Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005); *Chambers v.*

City of Frederick, 373 F. Supp. 2d 567 (D. Md. 2005). In determining whether the constitutional problems have been resolved, courts “look to the substance of the transaction as well as its form.” *Id.* Furthermore, courts have described “the typical sort of improprieties that might cause [a court] to disregard a transaction” as including: “a sale that did not comply with applicable state law governing the sale of land by a municipality; a sale to a straw purchaser that left the City with continuing power to exercise the duties of ownership; or a sale well below fair market value resulting in a gift to a religious organization.” *Mercier*, 395 F.3d at 702 (relying on *Marshfield*, 203 F.3d at 492). None of these deficiencies are present here, as the City exercised its lawful authority to transfer land to the federal government (not a “religious organization”) and no longer retains ownership duties.

In *Marshfield*, the United States Court of Appeals for the Seventh Circuit held that, although a transfer of land from the City to a private party cured one Establishment Clause violation, the City needed to go further “to avoid being perceived as supporting or endorsing a private religious message.” 203 F.3d at 497. The court emphasized, however, that “this perceived endorsement of religion can be alleviated without recourse to removal of the statue from [the] property.” *Id.* The Seventh Circuit court explained, much like this Court has in the present case, that “[o]n remand the district court may explore, in concert with the parties, how to

remedy the existing Establishment Clause violation.” *Id.* The court specifically held that “the appropriate solution” was to find a way “to differentiate between property owned by the Fund and property owned by the City.” *Id.*

In a similar case, the Seventh Circuit reversed a district court’s grant of summary judgment to plaintiffs seeking the removal of a Ten Commandments monument from property that had been transferred from a city to a private organization. *Mercier*, 395 F.3d at 693. In holding that the transfer cured any Establishment Clause violation, the court relied heavily on its previous decision in *Marshfield*. The court explained how, in *Marshfield*, it had “instructed the district court” to work with the parties to distinguish the property that had been transferred out of the city’s ownership. *Id.* at 700. As a result of that instruction, “[t]he district court ordered the installation, on Marshfield’s property, of a four-foot-high wrought-iron fence. Attached to the fence, the district court ordered the installation of two signs,” each disclaiming any connection between the city and the monument or its religious expression. *Id.* at 700-01. “In short,” the court explained, “*Marshfield* authorized an alternative to removal—a sale that did not involve ‘unusual circumstances.’” *Id.* at 702. The transfer of land involved in *Mercier* was essentially the same as that in *Marshfield*, and the court therefore reversed the district court’s decision and instructed it to “enter an order of summary judgment in favor of the City and the Eagles.” *Id.* at 706.

Moreover, in *Chambers v. City of Frederick*, the district court faced virtually the same type of transfer as that in *Marshfield* and *Mercier* and, like the Seventh Circuit, held that the transfer of the property out of the city's ownership cured any constitutional violation. Despite the fact that the city "failed to comply with its guidelines for selling city-owned property," and the fact that "the FOE bid less for the property than other bidders," the court found "no evidence . . . of 'unusual circumstances surrounding the sale of the parcel of land so as to indicate an endorsement of religion.'" *Chambers*, 373 F. Supp. 2d at 572 (quoting *Mercier*, 395 F.3d at 702). The court instead focused on what it found to be the most important aspect of the transfer: that the city "intended to conduct a valid sale in order to dissociate itself from the commandments monument." *Id.*

In the present case, the City of San Diego's intention in transferring the Mt. Soledad property to the federal government is exactly the same as that of the cities in the previous cases in selling their property to private parties: to dissociate itself from the religious aspects of the property by giving up ownership. Having been instructed that its attempts to conduct a sale to a private party have failed to meet the requirements of the California Constitution, the City sought to ensure compliance with the decisions of this Court by conveying the land to the federal government. This transfer was in accordance with the provisions of both federal and state law. *See, e.g.*, 108 P.L. 447 (designating the property as a national

memorial and instructing the Secretary of the Interior to accept the property if the City of San Diego offers it); CAL. HEALTH & SAF. CODE §§ 34506, 34508, 34510 (authorizing a city to dedicate or convey its property to the federal government). The transfer did not entail any of “the typical sort of improprieties that might cause [a court] to disregard a transaction,” as it “compl[ied] with applicable state law,” did not leave San Diego “with continuing power to exercise the duties of ownership,” and did not constitute “a gift to a religious organization.” *See Mercier*, 395 F.3d at 702. The District Court erred in not even considering the validity of the City’s transfer to the federal government, instead ordering the enforcement of an injunction crafted under very different factual circumstances. This Court should issue a stay in order to maintain the status quo during the appellate review process.

C. The previous decisions of this Court do not require the removal of the cross, and they clearly left open the possibility of a successful transfer of the land by the City.

The District Court clearly erred in this case by not considering other, less drastic ways to remedy the violation of the California Constitution given the City’s good faith efforts to comply with the court decisions in accordance with the public’s expressed will. A transfer of the Memorial from the City has been a viable, reasonable means of remedying the state constitutional problem throughout this litigation. In its initial opinion, the District Court suggested that the removal of a cross or the sale of the entire property were just two of the various ways that a

locality may remedy a constitutional problem of this variety. *See Murphy*, 782 F. Supp. at 1433-34 (mentioning “the economic expense of removing the cross, *of rendering non-public the property on which the cross stands or of otherwise attempting to cure the present infirmity*”) (emphasis added). On appeal, this Court noted that “[t]he district court did give some indication of what it believed were alternative methods of complying with its judgment.” *Ellis*, 990 F.2d at 1528, n.7. It is clear that one way of satisfying the District Court’s injunction “forbidding the permanent presence of each cross on the public property . . . where it currently appears” is for the City to simply relinquish ownership of the land. *See id.* at 1528; *see also id.* at 1530 (Beezer, J., specially concurring) (noting that a municipality “must either transfer the land or destroy the crosses” when it is instructed that it may no longer have a symbol with some religious significance on its property).

This Court’s most recent opinion in this case confirmed that a transfer of the property from the City is a viable means of correcting the constitutional problem. If this Court believed that *any and all* attempts to transfer the property by the City would invariably violate the California Constitution, it would have said so directly. Instead, the Court noted that “*the way in which* the City of San Diego sold the cross to a private entity . . . violates the California Constitution.” *Paulson*, 294 F.3d at 1125 (emphasis added). The main question the Court considered was “whether *the manner in which the City structured the sale* directly, immediately,

and substantially aided the sectarian purpose of preserving the cross. . . . [T]he answer is ‘yes.’” *Id.* at 1132 (citation omitted) (emphasis added). As this Court explained, “[t]he second sale . . . was structured to provide a direct, immediate, and substantial financial advantage to bidders who had the sectarian purpose of preserving the cross. For that reason, the sale violated article XVI, section 5 of the California Constitution.” *Id.* at 1133 (emphasis added).

This Court’s analysis of the manner and structure of one specific attempt to transfer the property was based upon the well-established principle that some attempts to transfer property in these situations meet constitutional requirements while others do not. The District Court erred in failing to consider on which side of the line the City’s transfer to the federal government falls. Given this Court’s conclusion that, “[n]o doubt there are several possible ways to cure this violation,” *id.* at 1134, the Plaintiff’s claim that “[t]he only conceivable remedy for the constitutional infirmity that now exists is to move the cross” is beyond the pale. *See* Plaintiff’s Points and Authorities in Support of Motion to Enforce Injunction, To Enforce Settlement Agreement, and to Determine Ownership of the Cross at 7, *Paulson v. City of San Diego*, No. 89-0820 (S.D. Cal. July 18, 2005). The District Court’s acceptance of this argument in May 2006 was even more stunning considering that, in October 2004, the court implicitly rejected that argument by stating that “removal of the cross would be *one remedy* for the constitutional

violation the Ninth Circuit identified in *Ellis*.” *Paulson v. City of San Diego*, No. 89-0820, Decision and Order (S.D. Cal. Oct. 12, 2004).

It is important to note that this Court has consistently rejected the Plaintiff’s claim, apparently adopted by the District Court, that the City is somehow acting in bad faith by seeking to alleviate any constitutional problems through the transfer of the Memorial. *See, e.g., Ellis*, 990 F.2d at 1529 (rejecting the Plaintiff’s claim that “the authorized and completed transfers . . . constitute a bad-faith and illegal end-run around the district court’s order.”); *id.* (Beezer, J., specially concurring) (rejecting the Plaintiff’s claim that transferring ownership of the cross would “thwart the injunctive relief granted by the district court”). This Court has explained that the City’s initial decision to sell part of the Memorial to a private group in response to the *Ellis* decision was designed “[t]o remedy the constitutional violation and to comply with the injunction.” *Paulson*, 294 F.3d at 1126. Similarly, after the first sale was held to be invalid, this Court recognized that “the City sought to sell the land atop Mt. Soledad [through a bidding process] *for the undeniably appropriate secular purpose of ensuring the presence of a war memorial on the site.*” *Id.* at 1132 (emphasis added). In light of these facts, “[t]o characterize the City’s efforts to comply with the injunction as anything but honest and in good faith borders on ridiculous and smacks of paranoia.” Defendant City of San Diego’s Opposition to Plaintiff’s Motion to Enforce Injunction, to Enforce

Settlement Agreement, and to Determine Ownership of the Cross at 7, *Paulson v. City of San Diego*, No. 89-0820 (S.D. Cal. Aug. 1, 2005). The District Court's refusal to even acknowledge the existence of the City's attempt to remedy the constitutional problem, let alone analyze its validity, cries out for thorough appellate review.

CONCLUSION

For the foregoing reasons, amici respectfully request this Court to issue a stay pending appeal in this matter.

June 9, 2006

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
**AMERICAN CENTER FOR
LAW & JUSTICE**
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890

ERIK M. ZIMMERMAN
**AMERICAN CENTER FOR
LAW & JUSTICE**
1000 Regent Univ. Dr.
Virginia Beach, VA 23464
(757) 226-2489

FRANCIS J. MANION
GEOFFREY R. SURTEES
**AMERICAN CENTER FOR
LAW & JUSTICE**
6375 New Hope Rd.
New Hope, KY 40052
(502) 549-7020

ROBERT TYLER
**ADVOCATES FOR FAITH
& FREEDOM**
32823 Highway 79 South
Temecula, CA 92592
(951) 252-8140

Counsel for Amici

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points, and contains 7,000 words or less (4,974 words in total, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)).

June 9, 2006

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
**AMERICAN CENTER FOR
LAW & JUSTICE**
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890

ERIK M. ZIMMERMAN
**AMERICAN CENTER FOR
LAW & JUSTICE**
1000 Regent Univ. Dr.
Virginia Beach, VA 23464
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LAW & JUSTICE**
6375 New Hope Rd.
New Hope, KY 40052
(502) 549-7020

ROBERT TYLER
**ADVOCATES FOR FAITH
& FREEDOM**
32823 Highway 79 South
Temecula, CA 92592
(951) 252-8140

Counsel for Amici

CERTIFICATE OF SERVICE

I certify that the appropriate number of copies of the attached brief amici curiae were served upon all the parties via a commercial carrier on June 9, 2006.

June 9, 2006

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
AMERICAN CENTER FOR
LAW & JUSTICE
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890

FRANCIS J. MANION
GEOFFREY R. SURTEES
AMERICAN CENTER FOR
LAW & JUSTICE
6375 New Hope Rd.
New Hope, KY 40052
(502) 549-7020

ERIK M. ZIMMERMAN
AMERICAN CENTER FOR
LAW & JUSTICE
1000 Regent Univ. Dr.
Virginia Beach, VA 23464
(757) 226-2489

ROBERT TYLER
ADVOCATES FOR FAITH
& FREEDOM
32823 Highway 79 South
Temecula, CA 92592
(951) 252-8140

Counsel for Amici

Service List:

James McElroy, Esq.
Law Offices of James McElroy
625 Broadway, Ste. 1400
San Diego, CA 92101

Counsel for Plaintiff-Appellee Philip K. Paulson

John W. Vinson
825 W. 11th St., Ste. 175
Austin, TX 78701

Counsel for Plaintiff Society of Separationists, Inc.

Anthony J. Shanley, Ste. 1200
David J. Karlin, Ste. 1100
San Diego City Attorney's Office
1200 Third Ave.
San Diego, CA 92101

James M. Chaplin
County Counsel Office
1600 Pacific Hwy, Rm. 355
San Diego, CA 92101

Counsel for Defendant-Appellant City of San Diego

Charles Berwanger, Esq.
Gordon & Rees, LLP
101 W. Broadway, Ste. 1600
San Diego, CA 92101

Counsel for Defendant Mt. Soledad Memorial Association, Inc.

Jordan C. Budd, Esq.
ACLU Foundation of San Diego
& Imperial Co.
450 'B' St., Suite 1420
P.O. Box 87131
San Diego, CA 92101