

1 David Blair-Loy SBN 229235
2 ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES
3 P.O. Box 87131
4 San Diego, CA 92138-7131
5 Telephone: (619) 232-2121
6 Facsimile: (619) 232-0036

2006 AUG 24 AM 10:08

7 Daniel Mach
8 T. Jeremy Gunn
9 ACLU PROGRAM ON FREEDOM OF RELIGION AND BELIEF
10 AMERICAN CIVIL LIBERTIES UNION FOUNDATION
11 915 15th St., N.W., Suite 600
12 Washington, D.C. 20005
13 Telephone: (202) 675-2330
14 Facsimile: (202) 546-0738
15 [*pro hac vice* applications to be filed]

16 A. Stephen Hut, Jr.
17 Jonathan H. Siegelbaum
18 Ryan P. Phair
19 WILMER CUTLER PICKERING HALE & DORR LLP
20 1875 Pennsylvania Ave., N.W.
21 Washington, D.C. 20006
22 Telephone: (202) 663-6000
23 Facsimile: (202) 663-6363
24 [*pro hac vice* applications to be filed]

25 Attorneys for Plaintiffs

COPY

26 **IN THE UNITED STATES DISTRICT COURT**
27 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

28 JEWISH WAR VETERANS OF THE UNITED
STATES OF AMERICA, INC., RICHARD A.
SMITH, MINA SAGHEB, and JUDITH M.
COPELAND,

Plaintiffs,

v.

DONALD H. RUMSFELD, Secretary of Defense,
in his official capacity,

Defendant.

CASE NO.

05CV 1728 JAH NLS

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE AND RELIEF

[ESTABLISHMENT CLAUSE OF
THE FIRST AMENDMENT TO
THE UNITED STATES
CONSTITUTION]

INTRODUCTION

1
2 1. This is an action for declaratory and injunctive relief challenging the continuing
3 display of a 43-foot Latin cross on government property on Mt. Soledad, San Diego, on the
4 ground that it violates the Establishment Clause of the First Amendment to the United States
5 Constitution.

6
7 2. Religious symbols, including those prominently displayed, are an important and
8 constitutionally protected form of religious expression in the American public sphere. The First
9 Amendment guarantees that houses of worship, homes and businesses may erect religious
10 symbols and display them visibly to the public. But there is a dramatic difference between
11 constitutionally protected religious expression by private individuals, families, and religious
12 communities and the constitutionally prohibited use of governmental power, authority, financing,
13 and property to promote the religious expression of some American citizens to the exclusion of
14 others.

15
16 3. There has long been a perfectly satisfactory and constitutional remedy to the
17 unconstitutional display of the Latin cross on Mt. Soledad: moving it to a non-governmental
18 site. For decades, however, many supporters of the Latin cross have rejected reasonable efforts
19 to resolve the constitutional dispute, sometimes with the explicitly articulated purpose of
20 promoting sectarian religious symbols, and at other times with thinly veiled attempts to suggest
21 that the Latin cross is simply a monument to honor veterans.

22
23 4. Most recently, in a transparent effort to evade a long series of unfavorable decisions
24 by the federal and California state courts invalidating the City of San Diego's display of the Mt.
25 Soledad cross, the United States obtained title to the Latin cross and its surrounding property
26 through a legislative taking. H.R. 5683, 109th Cong. (2006). The federal acquisition of the
27 Latin cross, however, does nothing to cure the ongoing constitutional violation. When any
28

1 government entity – federal, state, or local – uses taxpayer funds to acquire and prominently
2 display a religious symbol that is sacred to some, but not all, religious believers, it disregards the
3 religious diversity in our society and violates the fundamental right to religious liberty
4 guaranteed by the First Amendment.

6 JURISDICTION AND VENUE

7 5. This Court has jurisdiction over the subject matter pursuant to 28 U.S.C. § 1331, and
8 the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. Plaintiffs seek to redress the
9 violation by Defendant under the First Amendment to the United States Constitution.

10 6. Venue is appropriate in this District under 28 U.S.C. §1391(e), because a substantial
11 portion of the events and omissions giving rise to Plaintiffs’ claims occurred in the Southern
12 District of California.

14 PARTIES

15 7. Plaintiff Jewish War Veterans of the United States, Inc. (“JWV”), organized in 1896
16 by Jewish Veterans of the Civil War, is the oldest active national veterans’ service association in
17 America. JWV is a federally chartered patriotic organization which has among its purposes a
18 continuing commitment to maintain true allegiance to the United States of America; to foster and
19 perpetuate true Americanism; to uphold the fair name of Jews and fight their battles wherever
20 unjustly assailed; to encourage the doctrine of universal liberty, equal rights, and full justice to
21 all men and women; to combat the powers of bigotry and darkness wherever originating and
22 whatever the target; and to preserve the memories and records of patriotic service performed by
23 the men and women of the Jewish faith and honor their memory. In furtherance of its
24 organizational purposes, JWV engages in extensive advocacy in support of religious liberty. As
25 part of that advocacy, JWV has publicly opposed the government’s display of the Latin cross,
26 both on Mt. Soledad and elsewhere. *See, e.g., Jewish War Veterans of the United States v.*
27
28

1 *United States*, 695 F. Supp. 3 (D.D.C. 1988). JWV is a membership organization with tens of
2 thousands of members nationwide. JWV maintains a considerable presence in San Diego
3 County, with three separate JWV Posts in the San Diego area. JWV's members include
4 individuals who pay taxes regularly that are owed to the United States and state and local
5 governments, and who oppose government funding that promotes religion, including the funding
6 of the federal taking and continued display of the Latin cross on Mt. Soledad. JWV's members
7 also include individuals based in the San Diego area who regularly view the Latin cross on Mt.
8 Soledad, and who are offended by the government's communication of favoritism and
9 endorsement of the majority faith at the expense of citizens and veterans of other faiths who died
10 in the service of their country.
11

12 8. Plaintiff Richard A. Smith is a resident of La Jolla, California, where he has lived in
13 the same home since 1969. Smith is a taxpayer who pays taxes regularly that are owed to the
14 United States and state and local governments. Smith is a veteran of the United States Navy,
15 having served from 1969 to 1971 as the head of the Neurology Branch of the Navy's
16 Neuropsychiatric Research Unit in San Diego. His best friend, a physician, was killed in the Tet
17 Offensive during the Vietnam War. Smith, who is Jewish, has great respect for all religious
18 faiths, but is discomfited by the presence of a sectarian religious symbol on public property.
19 Specifically, he believes that the Latin cross on Mt. Soledad demonstrates a government
20 preference for certain forms of Christianity above all other religions, and that the message the
21 Latin cross sends is that non-Christians like himself are not full members of the political
22 community. He also believes that, to the extent the Latin cross serves in part to honor the service
23 of veterans, such an overtly Christian religious memorial devalues the contributions of veterans
24 like himself who are not Christian. Smith regularly sees the Mt. Soledad Latin cross from
25 numerous vantage points around San Diego. Among other things, he makes weekly visits to a
26
27
28

1 sister-in-law who lives in a house where the Mt. Soledad Latin cross can be seen from the
2 windows and the backyard. These weekly visits bring him into a position where he can directly
3 view the Latin cross and the unwelcome and exclusionary message he believes it communicates.
4 But for the presence of the Latin cross, Smith would visit Mt. Soledad again to enjoy the scenery
5 and to pay tribute to the war dead honored at the site.
6

7 9. Plaintiff Mina Sagheb is a resident of La Jolla, California, and has lived in the San
8 Diego area since 1990. She is a taxpayer who pays taxes regularly that are owed to the United
9 States and state and local governments. Sagheb has been married to Plaintiff Smith for four
10 years, and is Muslim. She has no objection to public displays of religious faith made by
11 individuals. However, she objects to government sanctioning of religious displays, since she
12 believes that the government should not favor one religion over another. Sagheb makes weekly
13 visits to a sister who lives in a house where the Mt. Soledad Latin cross can be seen from the
14 windows and the backyard. These weekly visits bring her into a position where she can directly
15 view the Latin cross and the unwelcome and exclusionary message she believes it communicates.
16 Sagheb has visited Mt. Soledad on at least one occasion, and, but for the presence of the Latin
17 cross, she would visit Mt. Soledad again to enjoy the scenery and to pay tribute to the war dead
18 honored at the site. Sagheb is an immigrant to the United States from Iran, a country she fled in
19 part because of its religious intolerance and the government's promoting of the religious beliefs
20 of some at the expense of others.
21
22

23 10. Plaintiff Judith M. Copeland has been a resident of San Diego, California since 1974.
24 She is a taxpayer who pays taxes regularly that are owed to the United States and state and local
25 governments. She has no objection to public displays of religious faith made by individuals.
26 However, she objects to government sanctioning of religious displays, since she believes that the
27 government should not favor one religion over another. Copeland sees the Latin cross
28

1 approximately twice a week while driving on Interstate 5, and is discomfited by the presence of a
2 sectarian religious symbol on public property. She has visited Mt. Soledad on at least one
3 occasion, and, but for the presence of the Latin cross, she would visit Mt. Soledad again to enjoy
4 the scenery and to pay tribute to the war dead honored at the site.

5
6 11. Defendant Donald H. Rumsfeld is the Secretary of the United States Department of
7 Defense. Pursuant to recently enacted federal legislation, *see* H.R. 5683, 109th Cong., § 2(c)
8 (2006), Secretary Rumsfeld manages the property containing the Mt. Soledad Veterans
9 Memorial in San Diego, California. Secretary Rumsfeld is sued in his official capacity.

10 **FACTUAL BACKGROUND**

11 **Description and History of the Mt. Soledad Latin cross**

12 12. The Mt. Soledad Latin Cross (“Latin cross” or “Cross”), a structure measuring 43 feet
13 in height with a 12-foot arm spread, is located on now-federal property at the top of Mt. Soledad
14 in San Diego, California. The Latin cross sits atop an 822-foot high hill and can be seen from
15 several miles away, including from Interstate 5, a public freeway that passes less than a half-mile
16 from Mt. Soledad.

17
18 13. The City of San Diego (“City”) first took possession of Mt. Soledad in the nineteenth
19 century. In 1916, the San Diego City Council (“City Council”) dedicated the property on which
20 the Latin cross rests, as well as 170 adjoining acres of property, as the Mt. Soledad Nature Park.
21 Although most of the 170-acre parcel is undeveloped and maintained in its natural state, the top
22 of the mountain has been cleared. Between 1913 and 1934, several crosses were erected atop
23 Mt. Soledad.

24
25 14. In 1952, the City Council authorized a private entity, the Mt. Soledad Memorial
26 Association (“MSMA”), to erect and maintain a sizeable Latin cross on top of Mt. Soledad. The
27 Cross was designed to replace predecessor crosses that were previously built on top of Mt.
28

1 Soledad but that were no longer standing. The MSMA constructed the Cross, consisting of
2 reinforced concrete and weighing approximately 24 tons, between 1952 and 1954.

3 15. The Latin cross is a sacred and revered symbol to many Americans and to many
4 Christians throughout the world. It is not, however, a symbol of the United States. Nor is it a
5 favored symbol of many devout Christians of a number of denominations. Many other religious
6 faiths have revered symbols that are given no status, no government support, and no placement
7 on Mt. Soledad.
8

9 16. On April 18, 1954, the MSMA dedicated the Latin cross during a Christian religious
10 ceremony held on Easter Sunday. During that ceremony, the Latin cross was explicitly dedicated
11 to "Our Lord and Savior Jesus Christ" in an MSMA dedication bulletin.
12

13 17. Since the Latin cross's initial dedication in 1954, the City of San Diego has granted
14 the MSMA a permit each year to conduct a sunrise service on Easter morning for Christians to
15 celebrate the resurrection of Jesus Christ.
16

17 18. Every annual publication of the Thomas Brothers Map for the San Diego area from
18 1954 to 1989 – the year the government's display of the Latin cross was first challenged in court
19 – presented a geographic legal description of the location as the "Mt. Soledad Easter Cross."
20

21 19. Throughout the past fifty years, the Latin cross has served not only as a religious
22 symbol but also as the site of numerous religious events, such as weddings, baptisms, and Easter
23 sunrise services.
24

25 20. For 38 years, there was no placard or marker indicating the presence of a veterans
26 memorial either on Mt. Soledad Natural Park or at the site of the Latin cross. The MSMA
27 installed such a marker with a "Veterans" memorial inscription only in 1992, after the onset of
28 litigation challenging the constitutionality of the display of the Latin cross on City-owned
property.

1 21. No secular or non-Christian symbols of comparable physical significance are present
2 at Mt. Soledad to moderate the sectarian Christian message conveyed by the Latin cross, which
3 towers above the rest of the memorial.

4 22. The predominant purpose of the Latin cross's presence on top of government-owned
5 property on Mt. Soledad is to promote one particular sectarian Christian symbol.

6 23. The predominant effect of the Latin cross's presence on top of government-owned
7 property on Mt. Soledad is to promote certain forms of the Christian religion.

8 24. The Latin cross's presence on top of government-owned property on Mt. Soledad is a
9 governmental endorsement of a particular form of religion and its symbols.

10 25. The Latin cross's presence on top of government-owned property on Mt. Soledad
11 gives official preference for certain sects within the Christian religion above all others.

12 26. The Latin cross's presence on top of government-owned property on Mt. Soledad
13 fosters an excessive governmental entanglement with religion.

14
15
16 **Early Litigation and Potential Settlement**

17 27. In 1989, a private individual sued the City in this Court over the Latin cross's
18 presence on top of Mt. Soledad, alleging that it violated the "No Preference" Clause of the
19 California Constitution, Cal. Const. art. I, § 4, as well as the Establishment Clause of the United
20 States Constitution, U.S. Const., amend. I. This Court found that "[w]here . . . the Latin cross
21 appears as a permanent, salient symbol on public property and on a public imprimatur,
22 California's constitution will not permit it to continue to stand." *Murphy v. Bilbray*, 782 F.
23 Supp. 1420, 1438 (S.D. Cal. 1991) (Thompson, J.). The Court ordered the City to remove the
24 Latin cross, and gave the City three months to comply with its order. On appeal, the Ninth
25 Circuit upheld the district court's determination and concluded that, even assuming the Mt.
26 Soledad Latin cross could properly be characterized as war memorial, it is "[a] sectarian war
27
28

1 memorial [that] carries an inherently religious message and creates an appearance of honoring
2 only those servicemen of that particular religion.” *Ellis v. City of La Mesa*, 990 F.2d 1518, 1527-
3 28 (9th Cir. 1993), *cert. denied*, 513 U.S. 925 (1994).

4 28. In October 1994, following this Court’s decision and the Ninth Circuit’s affirmance
5 of that decision, the City made its first attempt to remedy the constitutional violation via a ballot
6 initiative in which it urged voters to “SAVE THE CROSS ON MOUNT SOLEDAD,” not by the
7 constitutionally permissible means of moving it to a non-governmental site, but by authorizing a
8 no-bid sale of a 222-square foot parcel of land under the Latin cross to the MSMA. This Court
9 subsequently declared the sale invalid under the No Preference Clause as well as article XVI,
10 section 5 of the California Constitution, which “strictly prohibits any governmental support for
11 religious purposes.” *Murphy v. Bilbray*, Nos. 90-134 GT, 89-820 GT, 1997 WL 754604, at ** 9-
12 11 (S.D. Cal. Sept. 18, 1997) (Thompson, J.). The Court reasoned that it was readily apparent
13 that “the primary purpose for the sale . . . was to save the Mt. Soledad cross from removal and/or
14 destruction,” and that the City “clearly show[ed] a governmental preference for the Christian
15 religion” by “tak[ing] the position of trying to ‘save’ such a preeminent Christian symbol.” *Id.* at
16 * 10. Following this decision, the Association sold the 222 square foot parcel back to the City.

17 29. After this decision, the City published a notice soliciting bids on about a half-acre of
18 land in Mt. Soledad Park, and expressly stated that the sale of the parcel was “for the purpose of
19 maintaining a historic war memorial.” To this end, the City established a bidding process that
20 required applicants to explain their plans for “maint[aining] a historic war memorial on the site.”
21 Subsequently, the City announced that it accepted the MSMA’s bid as the winning bid. The
22 Ninth Circuit, sitting *en banc*, invalidated this sale as well, finding that it “was structured to
23 provide a direct, immediate, and substantial financial advantage to bidders who had the sectarian
24 purpose of preserving the [C]ross,” and accordingly violated article XVI, section 5 of the
25
26
27
28

1 California Constitution. *Paulson v. City of San Diego*, 294 F.3d 1124, 1133 (9th Cir. 2002) (en
2 banc), *cert. denied*, 538 U.S. 978 (2003).

3 30. Following the Ninth Circuit’s *Paulson* decision, a dispute arose in this Court as to
4 who actually owned the Latin cross. On October 12, 2004, this Court ruled that the City of San
5 Diego — and not the MSMA — owned the land under and around the Latin cross. The Court
6 further implored the parties to “[s]ettle this case! It’s time to move the cross from public land to
7 private land and comply with the laws of our great country instead of trying to find sneaky ways
8 to get around them to pander to a certain group or to satisfy an out-of-state group’s religious
9 agenda.”

10
11 31. The parties engaged in extensive settlement discussions over the course of several
12 weeks and agreed to settle the case by moving the Latin cross 1,000 yards to a nearby church.
13 Under the terms of the settlement, the MSMA would be allowed to maintain an interest in the
14 Mt. Soledad property and war memorial, and the Latin cross would be replaced with a non-
15 sectarian symbol that would appropriately recognize all veterans in exchange for an end to
16 litigation. These settlement terms would be perfectly acceptable to Plaintiffs here and would
17 have preserved the continued existence of the Latin cross — but in a constitutional way. The
18 settlement terms were presented to the City Council on July 20 and 27, 2004. But instead of
19 accepting the settlement outright, the Council attempted one last sale to the highest bidder, who
20 alone could decide whether to keep, remove, or replace the Latin cross. At the public meeting of
21 the City Council, the Mayor and four of five Council members, who voted to put the proposition
22 (known as Proposition K) on the ballot over strong MSMA and prominent veterans-group
23 opposition, expressly stated that the reason for their vote was to allow the Latin cross to remain
24 on Mt. Soledad. *See Paulson v. Abdelnour*, No. GIC-849667 at 27-28 (Cal. Sup. Ct. Oct. 7,
25
26
27
28

1 2005). One Councilmember even cited his membership in the “Jesus Christ fan club” as a reason
2 for his vote. *Id.* at 27.

3 32. On November 2, 2004, a substantial majority of San Diego voters — over 250,000 in
4 total — rejected Proposition K and directed the City Attorney to enter into the settlement
5 agreement.
6

7 **Overriding of the Settlement and the Intervention of (former) Congressman**
8 **Randy “Duke” Cunningham to “Save the Cross”**

9 33. Undeterred by the will of San Diego voters and this Court’s prior exhortation to
10 settle the case consistently with constitutional requirements, the City refused to comply with the
11 binding ordinance. Instead, with the active encouragement of the Thomas More Law Center
12 (“TMLC”), an advocacy group whose stated mission is the “promotion of the religious freedoms
13 of Christians” and the protection of “Christians and their beliefs in the public square,” the City
14 began its ongoing campaign to circumvent its constitutional obligations.

15 34. After San Diego voters overwhelmingly rejected Proposition K, the TMLC sought to
16 scuttle the binding settlement agreement and secure the intervention of the federal government
17 — all to save the Latin cross as a religious symbol.
18

19 35. On November 10, 2004, the TMLC sent a letter to Representative Randy “Duke”
20 Cunningham, a Congressman from San Diego and a member of the powerful House
21 Appropriations Committee, to solicit his help in convincing the federal government to override
22 the San Diego referendum and corresponding settlement agreement by declaring the Latin cross
23 a national war memorial. In so doing, the TMLC made clear that the principal reason for taking
24 such action was because “religion and morality are the foundation of our country” and the Mt.
25 Soledad Latin cross was “one of the most visible symbols of [our Christian faith].”
26
27
28

1 36. Acknowledging that there was “unfortunately” a local initiative whereby San Diego
2 voters overwhelmingly agreed to resolve the matter by entering into a settlement agreement, the
3 TMLC nonetheless asserted that “the culture war will continue to be fought on many fronts” no
4 matter what. Accordingly, the TMLC asked Representative Cunningham to “save the Cross”
5 and help “preserve this ... religious landmark” by declaring it a national war memorial.
6

7 37. Less than a month later, during the night of November 21, 2004, Representative
8 Cunningham inserted an eleventh-hour rider into the voluminous \$388 billion Fiscal Year 2005
9 Omnibus Appropriations Act (Pub. L. No. 108-447). The rider, which few had seen before
10 Representative Cunningham inserted it into the appropriations bill, (1) designated the Mt.
11 Soledad Veterans Memorial a national veterans memorial; (2) authorized the Department of the
12 Interior to accept the donation of the Memorial from the City of San Diego; and (3) directed the
13 National Park Service to enter into a memorandum of understanding with the MSMA for the
14 maintenance and administration of the memorial. Pub. L. No. 108-447, § 116, 118 Stat. 3346,
15 *codified at* 16 U.S.C. § 431 note (2004). Representative Cunningham acknowledged that he had
16 not asked for a written legal opinion from an attorney on whether the bill would allow the Latin
17 cross to remain at its current location, and that he was trying to “save the Cross” as a religious
18 landmark. The TMLC hailed Cunningham’s effort as “an act of God.”
19

20 38. With the exception of the TMLC, however, all parties to the long-running dispute
21 acknowledged that Representative Cunningham’s proposed legislation would not solve the
22 constitutional problem that the California state and federal courts had unanimously reaffirmed
23 multiple times over the preceding 13 years. The press has reported that William Kellogg,
24 Executive Director of the Mount Soledad Memorial Association, candidly acknowledged that he
25 did not see how Cunningham’s legislation would solve the underlying constitutional
26 impediments. Likewise, the press reported that the MSMA’s attorney, Charles Berwanger, said
27
28

1 that officials of the U.S. Department of Veterans Affairs had advised him that such a move
2 would run afoul of the First Amendment and had reaffirmed that opinion in the wake of Rep.
3 Cunningham's rider.

4 39. On December 8, 2004, President Bush signed the omnibus appropriation bill, with
5 Representative Cunningham's rider intact, into law. Soon thereafter, the TMLC and
6 Representative Cunningham successfully pressed San Diego Mayor Dick Murphy to add the
7 proposed federalization of the Latin cross by way of donation promptly to the City Council
8 Agenda.

9
10 40. Prior to the City Council meeting, however, San Diego City Attorney Michael
11 Aguirre issued a formal legal opinion that the federalization of the Latin cross by way of
12 donation would be a violation of the California Constitution and fall far short of a remedy that
13 would be deemed acceptable by the California state and federal courts. Mr. Aguirre's opinion
14 further observed that, "based on current case law, such a transaction would also violate the
15 federal Constitution and . . . provide fodder for additional legal proceedings against the City."
16 Kimberly Edds, *San Diego to Move Giant Cross; City Council Votes to End Suit Over Religious*
17 *Symbol*, Wash. Post (May 10, 2005).

18
19 41. On March 8, 2005, after a six-hour public hearing, the San Diego City Council voted
20 against donating the Latin cross to the federal government based on the MSMA's request, City
21 Attorney Aguirre's legal recommendation, and the recognition that the City had a binding
22 obligation to enter into the MSMA settlement agreement once Proposition K failed.

23
24 42. In a subsequent letter to the editor of the *San Diego Union-Tribune*, MSMA President
25 Bill Kellogg reiterated his "strong support" for the City Council's decision to reject
26 federalization of the Cross, saying he was "convinced it was the right decision for our
27 community and for our veterans." Mr. Kellogg stated accurately that the constitutional issue
28

1 “had already been litigated to the fullest extent possible,” that the Ninth Circuit’s decision in
2 *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004), in which the Ninth Circuit invalidated a nearly
3 identical attempt arising out of a war memorial in the Mojave Desert Preserve, “was directly on
4 point,” and that “only the patience of the courts has prevented the [original] order from being
5 carried out.” To those who “supported the federalization of the park [who] say they don’t care
6 about the cross itself; they care about ‘not caving in to a minority,’” Kellogg contrasted the
7 MSMA’s deep commitment to “the cross and the walls” and its equal commitment “to ensuring
8 that both remain standing in a public place where they can be enjoyed by all.” “Only by moving
9 the cross to another location” pursuant to the original MSMA settlement agreement, Kellogg
10 argued, could the Cross truly “be saved.”
11

12 43. Soon after the City Council’s decision, the TMLC and others, spurred on by Rep.
13 Cunningham and Mayor Murphy, spearheaded a petition and referendum drive under the aegis of
14 a TMLC-affiliated group called “San Diegans for the Mt. Soledad National War Memorial” to
15 rescind the Council vote. This wide-ranging and well-financed effort included 75 paid signature
16 gatherers, massive fundraising efforts, and a petition written by the TMLC that began with the
17 proposition, “You Can Save Our Cross.” Press reports described sermons from the Latin cross
18 site and other public and religious venues, including events at Qualcomm Stadium and Cox
19 Arena on Easter Sunday, that urged civil disobedience to flout the original Court order and save
20 the Latin cross.
21

22
23 44. At a May 17, 2005 meeting to consider the petition, two City Council members, while
24 expressing misgivings about the mounting legal costs the City was incurring, agreed to switch
25 their initial vote and to send the issue back to the voters. The Council accordingly voted 6-3 to
26 allow a public referendum, Proposition A, on the Latin cross. The vote on Proposition A was
27 scheduled to coincide with the July 26, 2005 special election to replace Mayor Murphy. After
28

1 the City Council's vote was announced, Latin cross supporters sang "Onward Christian Soldiers"
2 in the Council chamber.

3 **Further Litigation Over the Latin cross**

4 45. A private individual then challenged the proposed referendum on donating the Latin
5 cross to the federal government on the grounds that the donation would violate article I, section
6 IV (the No Preference Clause) and article XVI, section V (the No Aid Clause) of the California
7 Constitution. Soon after Proposition A passed, California Superior Court Judge Patricia Cowett
8 issued a temporary restraining order preventing the donation and a tentative ruling that any such
9 donation would be unconstitutional.
10

11 46. Following Judge Cowett's order, City Attorney Aguirre reportedly reiterated that
12 Proposition A was "clearly unconstitutional."
13

14 47. Seeking to overcome its inability to continue to bankroll the Latin cross litigation —
15 which to that point had been ongoing for 13 years — the City deputized the TMLC's lead
16 attorney, Charles LiMandri, as a special deputy city attorney who agreed to work for free.

17 48. On October 7, 2005, Judge Cowett issued a 35-page final decision striking down
18 Proposition A as unconstitutional. *Paulson v. Abdelnour*, No. GIC-849667 (Cal. Sup. Ct. Oct. 7,
19 2005). The decision recounts the extensive legal history of the dispute and the consistent and
20 unequivocal rulings by state and federal courts over the years. Based on "the consistent,
21 repeated, and numerous references to saving the Cross as the basis for deciding whether to
22 donate the memorial to the United States," Judge Cowett held that "one conclusion is
23 inescapable: this transfer is again an unconstitutional preference of the Christian religion to the
24 exclusion of other religions and non-religious beliefs in violation of the No Preference Clause of
25 the California Constitution." *Id.* at 28. In addition, Judge Cowett ruled that the City's attempt
26 "to go so far as to transfer away valuable land for no compensation for the purpose of saving the
27
28

1 cross is also an unconstitutional aid to the Christian religion in violation of the California
2 Constitution.” *Id.*

3 49. Judge Cowett likewise observed that maintaining the Latin cross as a part of a
4 national veterans memorial would “run[] afoul of the Establishment Clause of the United States
5 Constitution.” *Id.* Citing the Supreme Court’s recent decision in *McCreary County v. ACLU*,
6 125 S.Ct. 2722 (2005), Judge Cowett concluded: “Even today, it still can be said that at best the
7 Mt. Soledad Memorial has a secondary secular purpose (or at worst is but a sham secular
8 purpose) and that the predominant purpose of the memorial is a religious purpose.” *Id.* at 34-35.
9 Judge Cowett concluded by stating Judge Thompson’s initial pronouncement back in 1991 – that
10 if the City “truly wish[ed] to honor the war dead, then it should do so other than with the Latin
11 cross which it has permitted to stand atop Mt. Soledad” — “still stands the test of time and
12 history as related to this cross.” *Id.* at 35.
13
14

15 50. On May 4, 2006, this Court ordered the City of San Diego finally to remove the Latin
16 cross within 90 days or be fined \$5,000 a day. The Court held that “[c]onsistently, every court
17 that has addressed the issue has ruled that the presence of the Latin cross on Mount Soledad, land
18 which is owned by the City of San Diego ... violates Article I Section 4 of the California
19 Constitution.” *Paulson v. City of San Diego*, No. 89-0820GT, at 2 (S.D. Cal. May 3, 2006).
20 Having given the City 17 years to remedy the problem and expressing utter frustration with “the
21 long and torturous legal history” of the case, the Court stated that it was “now time, and perhaps
22 long overdue, for this Court to enforce its initial permanent injunction forbidding the presence of
23 the Mount Soledad Cross on City property.” *Id.*
24

25 51. In response to the Court’s order, San Diego City Attorney Aguirre once again
26 recommended that city officials stop politicizing the issue and incurring unnecessary legal costs
27 in a futile effort to save the Latin cross on appeal. MSMA President William Kellogg likewise
28

1 reiterated that the private war memorial organization was prepared to move the Latin cross to
2 nearby private property and replaced at the memorial with another fitting symbol for veterans of
3 the Korean War: “We feel it’s very important that the cross be saved. The location of the cross is
4 not the primary issue.”

5
6 52. The City sought a stay of Judge Thompson’s order pending appeal. On June 21,
7 2006, the Ninth Circuit denied the stay request. On July 7, 2006, Justice Kennedy, as the Circuit
8 Justice for the Ninth Circuit, granted a stay to preserve the status quo pending the respective
9 appeals of Judge Thompson’s and Judge Cowett’s decisions. *San Diegans for the Mt. Soledad*
10 *Nat’l War Memorial v. Paulson*, 126 S. Ct. 2856 (July 7, 2006) (Kennedy, J.).

11 **Recent Federal Intervention**

12
13 53. At the same time, Mayor Sanders and certain organizations lobbied the President and
14 Congress to help them evade the effects of the California Constitution by condemning and
15 effectuating a taking of the Mt. Soledad Latin cross by the federal government. On May 10,
16 2006, Congressman Duncan Hunter, who assumed leadership on the Latin cross issue in
17 Congress after Rep. Cunningham’s departure, asked the President to “use the authority found in
18 40 U.S.C. 3113 to begin immediate condemnation proceedings” concerning the Latin cross.

19
20 54. On June 27, 2006, Rep. Hunter introduced H.R. 5683. Stating an intent to “effectuate
21 the purpose” of Rep. Cunningham’s previous bill from 2004, H.R. 5683 declares that “there is
22 hereby vested in the United States all right, title, and interest in and to, and the right to
23 immediate possession of, the Mt. Soledad Veterans Memorial in San Diego, California.” H.R.
24 5683, 109th Cong., § 2(a) (2006). H.R. 5683 directs the United States to pay “just compensation
25 to any owner of the property.” *Id.* § 2(b). The bill states that upon acquisition of the memorial
26 by the United States, “the Secretary of Defense shall manage the property and shall enter into a
27
28

1 memorandum of understanding with the Mt. Soledad Memorial Association for the continued
2 maintenance of the Mt. Soledad Veterans Memorial by the Association.” *Id.* § 2(c).

3 55. The bill passed the House on July 19, 2006 and the Senate on August 1, 2006. The
4 President signed H.R. 5683 into law on August 14, 2006.

5 **CLAIM FOR RELIEF**

6 (Establishment Clause Violation)

7 56. Plaintiffs repeat and reallege paragraphs 1 through 55.

8 57. The Establishment Clause of the First Amendment to the U.S. Constitution provides
9 that “Congress shall make no law respecting an establishment of religion.”

10 58. Based on the allegations set forth above, Defendants have violated and continue to
11 violate Plaintiffs’ rights protected by the Establishment Clause.

12 59. An actual and present controversy between the parties exists such that declaratory
13 relief is appropriate.

14 60. The continued display of the Latin cross on federal land will cause irreparable harm
15 to Plaintiffs.

16 61. Plaintiffs lack an adequate remedy at law.

17 **PRAYER FOR RELIEF**

18 WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

- 19
- 20
- 21
- 22 (a) A declaratory judgment that the taking of the Mt. Soledad Latin cross and
23 its continued display on federally owned land violates the Establishment
24 Clause of the First Amendment of the United States Constitution;
- 25 (b) The entry of a preliminary and permanent injunctive relief enjoining the
26 continued display of the Mt. Soledad Latin cross on federally owned land;
- 27

- 1 (c) Encourage and permit the Latin cross to be moved, at the expense of
2 individual citizens who believe that the Latin cross should be preserved, to
3 an appropriate non-governmental site;
4 (d) An award to Plaintiffs of their costs, expenses, and attorneys' fees; and
5 (e) Such further and other relief as this Court deems just and proper.
6

7 DATED: August 24, 2006



8 David Blair-Loy SBN 229235
9 ACLU FOUNDATION OF SAN DIEGO &
10 IMPERIAL COUNTIES
11 P.O. Box 87131
12 San Diego, CA 92138-7131
13 Telephone: (619) 232-2121
14 Facsimile: (619) 232-0036

15 Daniel Mach
16 T. Jeremy Gunn
17 ACLU PROGRAM ON FREEDOM OF
18 RELIGION AND BELIEF
19 AMERICAN CIVIL LIBERTIES UNION
20 FOUNDATION
21 915 15th St., N.W., Suite 600
22 Washington, D.C. 20005
23 Telephone: (202) 675-2330
24 Facsimile: (202) 546-0738
25 [*pro hac vice* application to be filed]

26 A. Stephen Hut, Jr.
27 Jonathan H. Siegelbaum
28 Ryan P. Phair
WILMER CUTLER PICKERING HALE &
DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Telephone: (202) 663-6000
Facsimile: (202) 663-6363
[*pro hac vice* applications to be filed]

*Attorneys for Plaintiffs Jewish War Veterans
of the United States of America, Inc., David
A. Smith, Mina Sagheb, and Judith M.
Coleman*