

No. 02-1101

In The
Supreme Court of the United States

City of San Diego; Mt. Soledad
Memorial Association, Inc.,
Petitioners,

v.

Philip K. Paulson,
Respondent,

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Edwin A. Meese
Peter J. Ferrara
Counsel of Record
American Civil Rights Union
1232 Pine Hill Rd.
McLean, VA 22101
703-582-8466

Charles V. Berwanger
Gordon & Rees
101 W. Broadway
Suite 1600
San Diego, CA 92101
619-696-6700

Counsel for Petitioner Mt. Soledad Memorial Association

QUESTIONS PRESENTED

1. May the U.S. Court of Appeals for the Ninth Circuit develop its own expansive interpretation of the California Constitution, contrary to California law and the precedents of the California Supreme Court?
2. Did the Ninth Circuit incorrectly apply California precedents and law when it held that the City of San Diego's sale of public land containing a cross structure constituted impermissible aid to religion under the California Constitution, given that
 - (a) the sale was consummated at fair market value determined by an open public auction, with no requirement that the cross structure remain in place;
 - (b) the cross structure was not the property of the City, but of the purchaser winning the auction with the highest bid, who had only agreed to quitclaim its title to the cross if another party won the auction;
 - (c) the purchaser was not a religious institution.
3. Would invalidating a consummated sale of public land through open public auction to a private association, because the association maintains a cross structure on its acquired private land, violate the association's Freedom of Speech, Freedom of Religion and established property rights under the U. S. Constitution?

TABLE OF CONTENTS¹

TABLE OF AUTHORITIES.....iii
OPINIONS BELOW.....1
STATEMENT OF JURISDICTION.....1
PROVISIONS INVOLVED.....1
STATEMENT OF THE CASE.....2
REASONS FOR GRANTING THE WRIT.....9

I. The Ninth Circuit Has Violated One of the Most Fundamental Doctrines of Federal Law by Failing to Follow California Law and the California Supreme Court in Issuing Its Own Expansive Interpretation of the California Constitution.....9

II. The Decision of the Ninth Circuit Below Is Contrary to California Precedents and Law and Does Not Decide the Case as the California Supreme Court Would Have.....14

III. Invalidating the Consummated Sale of Public Land Through Open Public Auction to the Association, Which Has Owned the Land for Over 4 Years and Spent Almost \$1 Million Improving It, Would Violate the Association’s Freedom of Speech, Freedom of Religion, and Established Property Rights Under the U.S. Constitution.21

CONCLUSION.....26

¹ Corporate Disclosure Statement—The Mt. Soledad Memorial Association is a non-profit, non-stock corporation with no parent corporations. The American Civil Rights Union, which filed this brief on behalf of the Mt. Soledad Memorial Association, is also a non-profit, non-stock corporation with no parent corporations.

TABLE OF AUTHORITIES

CASES	PAGE
<i>California Educational Authorities v. Priest</i> , 12 Cal.3d 593 (1974).....	16
<i>California Teachers Ass’n. v. Riles</i> , 29 Cal. 3d 794 (1981).....	17,20
<i>Capitol Square Review v. Pinette</i> , 515 U.S. 753, 765 (1995).....	22
<i>Christian Science Reading Room v. San Francisco</i> , 784 F.2d 1010 (9 th Cir. 1986).....	15
<i>County of Los Angeles v. Hollinger</i> , 221 Cal. App. 2d 154 (1963).....	17,20
<i>East Bay Asian v. California</i> , 24 Cal. 4 th 693 (2000).....	19
<i>Ellis v. City of LaMesa</i> , 990 F.2d 1518 (9 th Cir.1993)....	2,13
<i>Erie Railroad Company v. Tompkins</i> , 304 U.S. 64 (1938).....	9,10,11
<i>Feminist Women’s Health Center, Inc. v. Philibosian</i> , 157 Cal. App. 3d 1076 (1984).....	17,20
<i>Freedom from Religion Foundation, Inc. v. City of Marshfield</i> , 203 F.2d 487, 491 (7 th Cir. 2000)....	13,18,24-25
<i>Frohliger v. Richardson</i> , 63 Cal. App. 209 (1923).....	17,20
<i>Hewitt v. Joyner</i> , 940 F.2d 1561, 1565 (9 th Cir. 1991).....	10

Johnson v. Fankell, 520 U.S. 911, 917 (1997).....10

Kong v. San Francisco, 18 Fed. Appx. 616 (9th Cir. 2001).12

Mitchell v. Helms, 570 U.S. 793, 828 (2000).....12

Murphy v. Bilbray, 782 F. Supp. 1420 (S.D.Cal.1991),
aff'd sub nom. Ellis v. City of LaMesa,
990 F.2d 1518 (9th Cir.1993).....2

Murphy v. Bilbray, no. 90-134, 1997 WL 754604
(S.D.Cal. Sept. 18,1997).....3

*Separation of Church and State Committee v. City of
Eugene*, 93 F.3d 617, 626 (9th Cir. 1996).....13

*Woodland Hills Homeowners Association v. Los Angeles
Community College District*, 218 Cal. App. 3d 79 (1990)..14

OTHER AUTHORITIES

U.S. Const.

First Amendment.....21-25

Fifth Amendment.....21-25

California Const.

Article 16, Section 5 (No Aid Clause).....passim

25 *Ca. Atty. Gen. Ops* 309 (1955).....18

PETITION FOR A WRIT OF CERTIORARI

Petitioner Mt. Soledad Memorial Association (“Association”) respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit published at 294 F.3d 1124 (9th Cir. 2002), is reprinted and attached in the Appendix.

STATEMENT OF JURISDICTION

The opinion and judgement sought to be reviewed is the opinion of the United States Court of Appeals for the Ninth Circuit published at 294 F.3d 1124 (9th Cir. 2002), which was entered on July 26, 2002.

Upon Petitioner’s Motion for Extension of Time, an extension of time was granted by the United States Court of Appeals for the Ninth Circuit to file a Petition for Rehearing by July 31, 2002. A timely Petition for Rehearing was subsequently filed on July 31, 2002. Rehearing was denied on October 22, 2002, by Order which is reprinted and attached in the Appendix.

The jurisdiction of this Court to review a judgement of a United States Court of Appeals is invoked under 28 U.S.C. Section 1254(1).

PROVISIONS INVOLVED

1. The First Amendment of the United States Constitution.
2. The Fifth Amendment of the United States Constitution.
3. Article XVI, Section 5, of the California Constitution.

STATEMENT OF THE CASE

Mt. Soledad Natural Park was dedicated in 1916 on land publicly owned by the City of San Diego (“City”). But unknown private citizens had already constructed a cross made out of redwood on top of Mt. Soledad in 1913. App.2a.

After vandals destroyed the cross, private citizens again replaced it with a wood and stucco cross in 1934. After a windstorm destroyed that cross, the formalized Mt. Soledad Memorial Association (“Association”) built the current cross on the site in 1954. In a ceremony that year, the Association dedicated the cross as a tribute to veterans of World War I, World War II, and the Korean conflict. The Association has borne the expense of maintaining the cross ever since. App.2a-3a.

Plaintiff Phillip K. Paulsen began this litigation in 1989, asking the Federal District Court in San Diego to order the City to remove the cross, based on federal question jurisdiction concerning the Federal Establishment Clause. In 1991, the court ruled that the presence of the cross on public land violates the No Preference Clause of the California Constitution, Article 1, Section 4. *Murphy v. Bilbray*, 782 F. Supp. 1420 (S.D.Cal.1991), *aff’d sub nom. Ellis v. City of LaMesa*, 990 F.2d 1518 (9th Cir.1993). The

court consequently issued an injunction prohibiting the City from allowing the cross to remain on public land. App.3a.

The City decided to cure the constitutional violation by selling the land under the cross to a private organization. The City obtained approval of the sale from voters in a referendum, where 76% voted in favor. App.3a-4a. The City carried out the sale through a private negotiation with the Association, selling 222 square feet around the cross for \$26,000. App.4a.

The district court, however, carefully reviewed the sale and ruled that it still did not satisfy the requirements of the state's No Preference Clause. *Murphy v. Bilbray*, no. 90-134, 1997 WL 754604 (S.D.Cal. Sept. 18,1997). The court concluded that failing to offer an opportunity to purchase the land to other possible buyers favored the cross and the Christian religion over others. Moreover, the parcel of land sold around the cross was too small. Surrounded by a public park, the small plot sold would not be recognized by most voters as private land distinct from the rest of the park. App.4a-5a.

So the City designed and carried out a second sale that would be acceptable to the court. It offered just over half an acre surrounding the cross for bid at an open public auction. App.5a. The Association agreed to quitclaim its property interest in the cross to the ultimately successful bidder if it was another party.² As a result, the cross was

² The Ninth Circuit erroneously stated that the Association agreed to quitclaim its interests *in return for* a refund of the \$14,500 it had paid towards the first, invalidated sale. App. 5a. But since the first sale did not go through, the City would have to refund the Association's payments for that sale in any event. So any such refund would not have been *in exchange for* the quitclaim. In fact, however, the \$14,500 was never refunded to the Association, but simply credited by the City to the purchase price for the second sale. App. 5a.

actually part of the package subject to bid, along with the land.

The land was subject to a restriction that it must be used “for the purpose of maintaining an historic war memorial.” App. 5a. The bid invitation also explicitly stated “The City is neither requiring nor precluding the retention or maintenance of a cross in its invitation for proposals.” App. 5a-6a. These provisions and the open auction itself were well publicized. App. 25a, 29a, 40a, 43a. This sale structure was, in fact, modeled after an open auction sale conducted by the City of San Francisco to resolve an essentially identical case involving a challenge to a cross in a public park, which had been recommended by Respondent in the first place.

The City received and responded to 42 requests for copies of the bidding package. App. 29a, 43a. Five bid proposals were ultimately submitted, including 2 from atheist groups, two from church groups, and one from the Association. App. 44a. The Association submitted the highest bid at \$106,000. After a thorough evaluation process by the City, the Association was declared the winner of the auction. App. 7a-8a, 44a.

The sale was consummated in September, 1998, with the Association paying the bid price, and title to the purchased property transferred to the Association. App. 44a-45a. The Association’s purchase includes all the land around the cross up to a public sidewalk that encircles the cross. Outside the sidewalk is a circular public driveway, and on the other side of that is a public parking lot. App. 34a.

The Association has since further delineated its property from the rest of the park by erecting 26 concrete bollards, one every 20 feet surrounding the property, with a

sign in the space between each 2 bollards stating “Mount Soledad Veterans Memorial – Private Property.” App. 26a. The Association has placed additional private property signs within the Memorial. The City has also placed signs in the surrounding park reiterating to the public that the Memorial is private property owned and operated by the Association.

Additional improvements made by the Association to the site include walls for the placement of recognition plaques honoring individual members of the Armed Services of the United States. Over 1300 such plaques have now been purchased and installed, and the space is open to all veterans regardless of race, creed, religion, or non-religion. The Association has also added brick walkways, a flagpole, and other landscaping. To date, the Association has spent almost \$1 million on such improvements, creating a first class war memorial.

Nevertheless, over a year after the sale was completed, on December 9, 1999, Respondent returned to the district court to challenge the sale. App. 38a. Respondent argued that the sale was structured to favor the Association (i) by requiring maintenance of a war memorial on the land, (ii) by considering the bidder’s experience in maintaining a war memorial, and (iii) by retaining complete discretion to accept or reject any bid for any reason. Accordingly, Respondent argued, the sale still violated the No Preference Clause.

But the district court rejected these contentions, saying,

“Although Plaintiffs argue that the bidding process and sale were so structured as to prefer the Mt. Soledad Ass’n, the evidence belies this contention. The City sent out a very well-publicized invitation for bids on the Mt. Soledad

Property. Forty-two entities requested copies of the invitation, with 5 serious proposals. The City also established a committee and neutral criteria for the evaluation of the bids it did receive, specifically stating that retention of the cross was *not* a factor to be considered in the evaluation process. In the end, the Mt. Soledad Ass'n was recommended to the City Council because it was the highest bidder. Plaintiffs argue that since the City retained the right to accept or reject any bid, this is evidence of preference for the Mt. Soledad Ass'n. However, all invitations for bids sent out by the City contain this same language for liability reasons. Hence, as far as the Court is concerned, the method of sale, through this open and apparently neutral bidding process did not favor the Mt. Soledad Association and did not violate the California Constitution's prohibition against the preference of religion."

App. 45a.

The Respondent also argued that the amount of land sold, surrounded by a public park, was still too small to prevent an appearance of preference for the Christian religion. But the court rejected this claim as well, saying, "The City has sold substantially all of the developed land under and surrounding the Mt. Soledad cross," App. 46a, and "The amount of land sold, with the proposed improvement, is sufficient to eliminate the appearance of preference of religion by the City." App. 47a.

On appeal, a three judge panel of the Ninth Circuit unanimously affirmed the district court. The court said,

"Here, the city's sale of the property to the highest bidder did not constitute a preference in evaluation of the bids....The evidence establishes that religious and secular groups had equal opportunity to purchase the land.

Furthermore, a sale of real property generally is an effective way for a public body to end its inappropriate endorsement of religion.”

App. 30a. The court also said,

“Because the land was sold in an open bidding process, with its express provision that the purchaser’s intent to keep or remove the cross from the property would not be considered in evaluating bids, any appearance of preference for religion is dispelled.

App. 33a.

However, on Sept. 25, 2001, Respondent petitioned for rehearing *en banc* solely on the grounds that the public sale violated the No Preference Clause of the California Constitution and the federal Establishment Clause. App. 72a-87a. The Ninth Circuit granted this petition for rehearing on Feb. 7, 2002. The *en banc* panel then ordered supplemental briefing only on the issue of whether the existence of the cross violated the state No Preference Clause or the federal Establishment Clause. App. 71a.

At oral argument on March 21, 2002, no issue was raised regarding Article XVI, Section 5 of the California Constitution (No Aid Clause). Yet, on June 26, 2002, without any briefing or argument on this No Aid Clause, the *en banc* panel ruled 7-4 that the sale to the Association was unconstitutional, relying exclusively on this Clause.

The conclusion of the majority opinion relied on one simple point. The majority argued that the City gave away the cross for free as part of the sale. This allegedly provided a financial benefit to bidders who wanted to preserve the cross as part of their proposed war memorial plan. Those

bidders would be able to devote all their resources to the bid price because they would have to spend little or nothing on the memorial if they won (see especially the majority's example at App. 17a, which makes this point). The cross granted for free would satisfy the condition of providing a war memorial on the site. Those bidders who wanted to propose a memorial without the cross, however, were at a financial disadvantage, as they would have to bear the costs of producing a memorial as well as the costs of their bid. App. 16a-18a.

The majority opinion said,

“To those potential buyers who wanted to preserve the cross or convey its message, the City gave away for free an economically valuable means of fulfilling this main condition of the sale. By contrast, to those potential buyers who wanted to construct a nonsectarian war memorial, the City conveyed nothing that would help satisfy the obligation to maintain the site as a war memorial. To the contrary, those purchasers would be saddled with the costs of removing the cross and of constructing an alternative memorial.”

App. 16a. Perhaps because the issue had not been briefed or argued, the court did not discuss facts in the record regarding costs of maintaining the cross, the costs of demarking the property around the cross to ensure that visitors would recognize that it was private property separate from the rest of the park, and the other costs of improvements in the Association's winning bid, which have since totaled close to \$1 million.

The majority opinion concluded,

“In short, by establishing a specified use as a condition of sale (the maintenance of a war memorial) and then providing gratis the means to satisfy that condition to only those bidders who supported preservation of the cross, the City gave a direct, immediate and substantial economic incentive to advance a sectarian message.”

App. 17a.

The four dissenters adopted the opinion of the first, three judge, Ninth Circuit panel, terming it an “excellent opinion” that answered the questions raised “with clarity and precision.” App. 20a-21a. Consequently, the 14 Ninth Circuit judges who heard and ruled on the issue of the constitutionality of the second sale of the land around the cross split exactly evenly, 7-7.

REASONS FOR GRANTING THE WRIT

- I. The Ninth Circuit Has Violated One of the Most Fundamental Doctrines of Federal Law by Failing to Follow California Law and the California Supreme Court in Issuing Its Own Expansive Interpretation of the California Constitution.

One of the most fundamental principles of Federal law is the *Erie* doctrine, which provides the foundation for relations between the Federal and State courts. *Erie* requires that Federal courts deciding state law questions are to apply the law of the state as reflected in state statutes, regulations, judicial precedents, and other sources of law. *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938).³ Most basically, a Federal court deciding a state law question is to attempt to decide the issue the way the state Supreme Court would.

³ *Erie* has been called “one of the most important cases at law in American legal history.” Black, Address, 13 Mo. B.J. 173, 164 (1942).

Erie, Johnson v. Fankell, 520 U.S. 911, 917 (1997); *Hewitt v. Joyner*, 940 F.2d 1561, 1565 (9th Cir. 1991).

To be sure, the Ninth Circuit in the opinion below paid lip service to this fundamental doctrine and discussed state law and precedents. But in reaching its decision it did not remotely comply with this doctrine. For there is no conceivable way that the California Supreme Court would have held the second sale to the Association to be impermissible aid to religion under the state Constitution's No Aid Clause. This is true for several reasons.

First, as discussed in detail in Section II, California law and precedents clearly establish that property sold by the state or any of its subdivisions at fair market value does not constitute aid to religion. That is the well-established rule in California because it embodies the most basic common sense. If a state sells land at fair market value determined at open public auction to a church, and the church builds a new worship hall on it, that does not constitute aid to religion. That is an even exchange of value for value.

Such an open public auction of property at fair market value is all that occurred in this case. The city put out for bid a package of both the land and the cross. Such a public auction is the best possible way of determining the true fair market value of the package of property sold. The Ninth Circuit's whole argument was that the City gave away the cross for free, to the benefit of religious purchasers only. But that could not be more transparently wrong. The entire package, both land and cross, was put out for bid, and the bidding process determined the value of both the land and the cross together. So the City did not give away the cross for free. Rather, the entire process was set up to sell the cross at fair market value, as well as the land.

Secondly, as also discussed in detail in Section II, the City could not even give away the cross for free because the cross never belonged to the City. At all times since 1954, the cross has been owned by the Association. In the sale involved in this case, the Association simply kept the cross it owned all along, and bought the surrounding land. So there was never any transfer of a cross that could conceivably be considered an aid to religion.

Thirdly, as also discussed in more detail in Section II, the Association itself is not a religious organization or institution, but a non-sectarian, non-profit charity. Yet, the California courts have never found impermissible aid to religion under the state's No Aid Clause where the transfer involved did not go to a religious institution or organization.

Since the California Supreme Court quite clearly would not have reached the same result as the Ninth Circuit did in this case, the Ninth Circuit has violated Federal law in failing to follow the *Erie* doctrine. Given the central importance of *Erie* to the whole relationship between state and Federal courts, Petitioner submits that the violation is grounds enough alone for the Court to grant the requested writ of certiorari in this case. The Ninth Circuit's usurpation of state power and authority deprived the people of California in general, and the people of San Diego in particular, of their just right to adopt the state and local law and policies they prefer. The result also deprives the litigants in this case of their proper legal rights, and misleads decisionmakers and litigants who will have to deal with analogous issues under the state's No Aid Clause in future cases. Moreover, the California Supreme Court will not be able to correct the Ninth Circuit's misapplication of state law until a sufficiently analogous case comes to it.

The transgression of the Ninth Circuit is all the more egregious because the state's No Aid Clause is a Blaine Amendment, adopted as the result of a national anti-catholic movement. Blaine provisions were aimed at keeping all state education funds in the hands of public schools operated at that time to promote the Protestant faith, and out of the hands of Catholic parochial schools.⁴

Because of this birth as a prejudiced, discriminatory policy, state Blaine Amendments have recently been denounced by this Court as a "shameful pedigree that we do not hesitate to disavow." *Mitchell v. Helms*, 570 U.S. 793, 828 (2000). Such a provision should at a minimum be read in the most narrow fashion, not in the excessively expansive manner espoused by the Ninth Circuit.

In addition, the Ninth Circuit's decision threatens the preservation of our nation's historic structures and relics if they have any religious significance. Under the Ninth Circuit's doctrine, any attempt by a government to preserve such historic property by selling it in the open market would constitute government aid to religion.

Probably hundreds of such properties can be found in government hands across the country. California holds four restored Spanish missions in the state park system. See California State Parks website at <http://www.parks.ca.gov>. Close to 100 additional properties with religious significance are owned and maintained by the state or one of its municipalities. See also *Kong v. San Francisco*, 18 Fed. Appx. 616 (9th Cir. 2001)(challenge by atheists to open sale

⁴ California's No Aid Clause has been recognized as a Blaine Amendment by legal scholars. 12 Geo.Mason U. Civ. Rts. L. J. 159. 192, fn. 125 (2002). See also http://www.blaine-amendment.com/states/states_files/CA.html.

of public property containing a cross fixture on Mt. Davidson).

The Ninth Circuit emphasizes that it was the requirement that the Mt. Soledad property be maintained as a war memorial as well as the sale of the cross that resulted in the constitutional violation in this case. But any of these historical properties sold to a private owner would undoubtedly be subject to a restriction they be maintained in their historical state.

The Ninth Circuit's decision is, indeed, in deep conflict with a developing string of precedents quite rightly building the principle that governments can sell such property on the open market to preserve them. *Freedom from Religion Foundation, Inc. v. City of Marshfield*, 203 F.2d 487, 491 (7th Cir. 2000) ("Absent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion."); *Separation of Church and State Committee v. City of Eugene*, 93 F.3d 617, 626 (9th Cir. 1996); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1528, 1529-1531 (9th Cir. 1993) (Beezer, J., specially concurring).

Finally, this case threatens the rights to freedom of speech and freedom of religion of all property owners in the country, as well as the Association and veterans families involved in the memorial. Litigants will argue that there is no rational distinction between this case and a case where a privately displayed cross sits on land adjacent to public property, or can be seen prominently from some public property. They would also challenge any religious symbol on private land that was recently owned by a government, again using this case as a precedent.

II. The Decision of the Ninth Circuit Below Is Contrary to California Precedents and Law Does Not Decide the Case as the California Supreme Court Would Have.

As discussed above, the Ninth Circuit *en banc* decision was based on one simple point. The *en banc* majority said that by giving away the cross for free as part of the sale, the City skewed the auction to favor those bidders who wanted to preserve the cross as part of their required war memorial. According to the majority, with the cross these religious bidders would have to spend little or nothing on the memorial and could devote all of their funds to the bid. Those who wanted a memorial without the cross would have to spend funds for building an alternative memorial and, all else equal, would not be able to bid as much to win the auction.

This thoroughly fallacious reasoning is contrary to California law and the precedents of the California courts. Consequently, it quite clearly does not decide the case the way the California Supreme Court would have. This is so for several reasons.

First, the cross was not given away for free as part of the sale. The City put out for bid a package of both the land and the cross. The bidding process consequently determined the fair market value of both the land and the cross together. The sale was completed in return for payment of this fair market value.

California law and precedent clearly establish that property sold by the government at fair market value does not constitute aid to religion. For example, in *Woodland Hills Homeowners Association v. Los Angeles Community College District*, 218 Cal. App. 3d 79 (1990), the Los

Angeles Community College District leased surplus community college land to a church, The New Reform Congregation. The lease was for 75 years for a total rental payment of \$3,025,000. The church intended to use the land for a new temple, church meeting rooms, and some residential housing for church officials.

The nearby homeowners association sued to stop the sale, claiming that it violated the California No Aid Clause. But the court rejected the claim because the transaction involved an arms length lease for rent at fair market value. The court said,

“Any benefits to the Congregation, other than the ordinary consequences resulting from the lease of real property, which happen to benefit the lessee in a religious or philosophical manner, are incidental. Such incidental benefits, which may result from such transaction, do not constitute an improper advancement of religion in violation of the federal and state constitutions.”

218 Cal. App. 3d at 94.

Similarly, in *Christian Science Reading Room v. San Francisco*, 784 F.2d 1010 (9th Cir.1986), the San Francisco Airport terminated the tenancy of the Christian Science Reading Room because it believed the lease violated the state’s No Aid Clause, among other provisions. But the lease was an arm’s length transaction with the Reading Room paying fair market value rent. The Court consequently upheld the lease, saying in regard to the No Aid Clause,

“The clause, however, ‘does not prohibit a religious institution from receiving an indirect, remote, or incidental benefit from a [policy] which has a secular primary

purpose'[T]he Reading Room received only an indirect or incidental benefit from the Airport's rental policy, and the policy had a solely secular purpose. Furthermore, the Attorney General of California has held that it is proper under [the No Aid Clause] for an airport to lease space in one of its buildings to a religious organization as long as the rental transaction is at arms length."

784 F.2d at 1016.

In *California Educational Authorities v. Priest*, 12 Cal.3d 593 (1974), a public agency was authorized to sell bonds to construct facilities at private colleges and universities in California. The agency would then lease to each college the particular facilities it built for the institution. When all the costs for a project have been met and the bonds paid off, title to the project is then transferred to the college. The public bonds issued by the agency are tax exempt, which results in lower interest. The participating colleges receive the benefit of this as the costs they have to repay are reduced.

The California Supreme Court held that sectarian colleges and universities could participate in the program without violating the Federal or state constitutions, including the No Aid Clause of the California Constitution. Again, each college or university paid for the full cost of each project itself. The court said, "The bonds issued by the Authority will be repaid from revenues generated by the projects themselves." 12 Cal.3d at 603. In regard to the No Aid Clause in particular, the court said,

"The Section has never been interpreted, however, to require government hostility to religion, nor to prohibit a religious institution from receiving an indirect, remote and incidental benefit from a statute which has a secular, primary purpose."

Id. at 605.

By contrast, every case finding impermissible aid to religion has involved a grant or other benefit received free of charge. For example, in *Feminist Women's Health Center, Inc. v. Philibosian*, 157 Cal. App. 3d 1076 (1984), where impermissible aid to religion was found, the Los Angeles County district attorney sought to give 16,500 undisposed fetuses to the control of the Catholic League free of any charge. The Catholic League planned to conduct a public funeral service for the fetuses before burying them, which would dramatize the League's religious opposition to abortion.

Similarly, in *California Teachers Ass'n. v. Riles*, 29 Cal. 3d 794 (1981), a state program lent textbooks to private schools, including primarily religious Catholic schools, free of any charge. This simple grant program involved impermissible aid to religion.

Frohlinger v. Richardson, 63 Cal. App. 209 (1923) involved a state grant of \$10,000 for the restoration of the San Diego Mission, an historic Catholic church property still in use. Even though the purpose of the grant was historic preservation rather than aid to religion, the aid was uncompensated by the Catholic Church, and, therefore, was impermissible.

Quite similarly, in *County of Los Angeles v. Hollinger*, 221 Cal. App. 2d 154 (1963), the Bethlehem Star Parade Association organized a highly religious Christmas parade each year specifically to restore the original religious significance of Christmas. The County of Los Angeles authorized funding for the Association to produce a film of the parade that could be distributed nationally. Just as the

grant in *Frohlinger* was for the secular purpose of historic preservation, this funding was for the secular purpose of promoting tourism and commerce. But the uncompensated free funding here directly serving religious ends was nevertheless again impermissible aid.

The rule established by this line of cases is also reflected in an opinion of the California Attorney General. 25 *Ca. Atty. Gen. Ops* 309 (1955). That opinion indicates as well that a public auction sale of property to the highest bidder “where price is established by competitive bidding” does not provide aid to the buyer under the No Aid Clause. *Id.* at 313. See also, *Freedom from Religion Foundation, supra*, 203 F.3d at 492 (Where a City sold the land around a religious statue of Christ to a private Fund, the court said, “Because the Fund paid a fair market price for the land, we need not address whether the City has granted a religious organization a gift in the form of a sub-market rate sale price.”).

The rule established by these authorities just makes basic common sense. A property or benefit fully paid for at fair market value is not aid, but the equal exchange of value for value.

A second problem with the Ninth Circuit argument is that their analysis regarding the financial benefits and incentives supposedly favoring religious bidders in the cross auction is also contrary to the law, facts, and basic logic. While the *en banc* majority argued that a free cross provided with the sale satisfied the obligation to provide a war memorial for religious bidders, the truth is quite different. Those who wanted a memorial that preserved the cross not only had to pay fair market value for the cross determined by open auction. They also had to pay to maintain the cross, and to construct improvements that would delineate the

purchased property from the rest of the park. Indeed, the improvements to the property specified in the Association bid to produce a truly first class memorial have cost close to \$1 million.

By contrast, a bidder that did not want to preserve the cross could simply sell it to others at fair market value. Alternatively, a successful nonreligious bidder could surely reject any quitclaim of the property interest in the cross from the Association. The successful bidder could then tell the Association to get its cross off what is now the private property of the bidder. Such a bidder would also not bear any maintenance costs for the cross, nor any costs of improvements to clearly set off the private memorial from the rest of the park. So the Ninth Circuit's supposed financial incentives favoring religious bidders are a fantasy on several grounds.

A third major problem with the Ninth Circuit's argument is that the City could not have given away the cross for free because the City never owned the cross. The cross was built by the cross in 1954, and has been maintained and owned by the Association continuously since then. The Association's offer to quitclaim its interest in the cross to the successful bidder was never exercised because the Association itself was the successful bidder. So how can the continuous ownership of the cross by the private association before, during and after the sale somehow involve impermissible aid to religion? It cannot. There was never any transfer of the cross that could somehow involve an aid to religion.

The most recent pronouncement of the California Supreme Court on the No Aid Clause, *East Bay Asian v. California*, 24 Cal. 4th 693 (2000) is directly on point here. That case involved a state statute that allowed churches to

grant themselves an exemption from the state's landmark preservation law. Several private groups sued claiming that such exemptions involved an unconstitutional aid to religion under the No Aid Clause.

But the California Supreme Court upheld the statute because,

“permitting a religious entity to exempt its noncommercial property from landmark designation status simply leaves the property in the status it otherwise occupied.”

74 Cal. 4th at 721. That applies directly to the present case as well. The sale challenged in this case simply left the cross with the same ownership status as before, in the hands of the Association. So the role of the cross in the transaction could not be considered an unconstitutional aid to religion.

A final problem with the decision of the *en banc* majority below is that every California case where impermissible aid under the No Aid Clause has been found has involved aid to an explicitly religious organization or institution. *Feminist Women's Health, supra*, involved aid to the Catholic League. *Riles, supra*, involved aid to private Catholic schools. *Frohlinger, supra*, involved aid to the Catholic church itself. *Holliger* involved a sectarian Christian organization focused exclusively on advancing a religious Christian message. Indeed, as a Blaine Amendment, the No Aid Clause arose historically precisely to foreclose government aid to religious institutions, in particular the Catholic church. It was not aimed at private secular organizations simply expressing some religious speech.

The Association in this case is not such a religious organization or institution. It espouses no religious doctrine. It doesn't hold services. Its war memorial is open to everyone of all faiths or no faith, and it includes plaques honoring individual veterans regardless of religious view. Even if the cross is considered religious expression, the No Aid Clause does not preclude aid to secular private entities that choose to engage in some religious expression. Consequently, the No Aid Clause does not apply to this case.

For all of these reasons, the Ninth Circuit *en banc* majority erroneously applied California law and precedents and did not remotely rule as the California Supreme Court would have. As a result, it also again violated Federal law under the *Erie* doctrine.

III. Invalidating the Consummated Sale of Public Land Through Open Public Auction to the Association, Which Has Owned the Land for Over 4 Years and Spent Almost \$1 Million Improving It, Would Violate the Association's Freedom of Speech, Freedom of Religion, and Established Property Rights Under the U.S. Constitution.

There is one simple, undeniable fact in this case that changes everything. The cross is now on privately owned land, and has been for over 4 years. The terms of the original injunction issued by the district court, ordering the City to end the permanent presence of the cross on public land, no longer apply. To carry out the ruling of the Ninth Circuit *en banc* majority, the district court must do one of two things. It must either invalidate the sale to the Association and start over with the City, or it must order the government to go onto private land and destroy a privately owned cross. Either course would violate the Association's

rights to freedom of speech, freedom of religion, and property under the U.S. Constitution.

The bottom line is that it is far too late in the day to complain any further about a cross on public land, particularly based on the California Constitution, which is superseded by rights under the U.S. Constitution. Consequently, the U.S. Constitution requires this case to be ended now.

As discussed in the Statement of the Case above, the sale of the property to the Association was consummated in Sept., 1998. Since then the Association has spent close to \$1 million on improvements to the property to create a first class war memorial, as it specified it would do in the original bid.

As the original, three judge, Ninth Circuit panel in this case so aptly recognized, “the fact that this land is private both by its sale and designation triggers protection of the Association’s constitutional rights of Free Exercise and Free Speech.” App. 35a. In rejecting the Respondent’s challenge to the cross auction, the court said, “[W]e decline to adopt a rule that would infringe upon private property owners’ constitutional rights to display religious symbols on their land simply because their land sits next to publicly owned land or was formerly on public land.” App. 37a. Similarly, in *Capitol Square Review v. Pinette*, 515 U.S. 753, 765 (1995), the U.S. Supreme Court said, “There is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”

If the district court tries to implement the *en banc* panel’s order by invalidating the sale, then it will be doing so

only because the private association maintained the cross on its own private land. If the winning bidder at the auction had removed the cross, there would be no conceivable aid to religion and no basis for invalidating the sale at all. The invalidation of the sale would consequently violate the Association's rights to freedom of speech and freedom of religion under the U.S. Constitution.

Moreover, especially since the Association has spent close to \$1 million improving the land, invalidating the sale would involve a taking of private property under the Fifth Amendment. The City would then have to compensate the Association for the Taking. That would involve the original purchase price and the cost of the improvements, which the Association implemented in accordance with the commitments made in the winning bid, a total of over \$1 million. Then what would the City do with the property. No one except the Association would be willing to put \$1 million back into the property in another auction. So is the whole process just to juggle around some legal documents and end up with the same result as today? And what sense does it make to take this property in the first place on the grounds that it was once owned by the City almost 5 years ago?

Then there are free speech, freedom of religion, and property rights of the 1300 families who have bought plaques surrounding the cross. Surely many of them consider the cross part of the message they are sending, and part of their purchased interest in the memorial. If the City nullifies the sale and takes down the cross, or sells the property to a different buyer who takes down the cross, then the federal free speech, freedom of religion, and property rights of these families would be violated as well.

Alternatively, if the court orders the City or the Association to remove the cross, that would be an unprecedented violation of the rights of freedom of speech and freedom of religion as well, for the Association and the plaque owners. The government has never forcibly removed a cross from private property. And what if the Association rebuilt an identical cross on its private land? Surely a court cannot constitutionally enjoin a private landowner from engaging in such religious expression permanently. And if the Association can so resurrect the cross, then what is the point of all this legal gymnastics in the first place?

Moreover, if the district court goes down this road, that will endanger the rights to freedom of speech and freedom of religion of all property owners in the country. Litigants would argue that there is no rational distinction between this case and a case where a privately displayed cross sits on land adjacent to public property, or can be seen prominently from some public property. They would also challenge any religious symbol on private land that was recently owned by a government, again using this case as a precedent.

Freedom from Religion Foundation, supra, is a closely analogous case that strongly supports this analysis. In that case, a private religious association donated a large statue of Jesus Christ to the City of Marshfield, Wis., which placed it in a public park. In response to a legal challenge, the City later sold the statue and a small area of surrounding land to a private Fund. The plaintiff challenged the sale as itself government action that perpetuates and unconstitutional endorsement of religion.

The Court said, “Absent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion.” 203 F.3d at

491. In regard to the case before it, the court said, “Our independent review of the facts here leads us to conclude that this sale validly extinguished any government endorsement of religion.” 203 F.3d at 492. As a result of the sale, the court recognized, “The Fund owns the property on which the statue rests, so the expression made by the statue is now private religious speech.” 203 F.3d at 495.

Nevertheless, the court still found a constitutional violation in that the private land and statue was not demarked as private property separate from the surrounding public park. The court said, “Had the sale of the property been constructed in such a manner as to remove the impression that the statue remained part of the public forum, there would be no question that the City ended it Establishment Clause troubles.” 203 F.3d at 496. Crucially, the court went on to say that violating the private landowners rights to freedom of religion and freedom of speech was not the appropriate solution. 203 F.3d at 497. The appropriate solution was for the City to clearly separate the private property from the public park with appropriate structures and signs. Of course, that has already been done in the present case, at the expense of the Association. See also, *Ellis, supra*, (“The Court cannot remove the cross without potentially violating the property rights of the Hiers of Yawkey who may have legal title to both the land and the cross.” 990 F3d at 1530).

In short, the original facts that gave rise to a constitutional violation in this case are long gone. This is no longer a case about a cross on public land. This is a case about a privately owned cross on private land. There is no longer any ongoing constitutional violation to correct. Imposing new, impractical remedies for a violation that no longer exists will only violate the federal Constitutional rights of private property owners and speakers.

Consequently, the opinion of the Ninth Circuit *en banc* panel must be reversed, and the opinion of the original three judge Ninth Circuit panel reinstated.

CONCLUSION

For all of these reasons, this case presents important, fundamental questions of law which were wrongly decided in conflict with other authorities and in violation of both Federal and state law. Consequently, Petitioner respectfully requests that the Court grant the requested writ of certiorari.

Edwin A. Meese
Peter J. Ferrara
Counsel of Record
American Civil Rights Union
1232 Pine Hill Rd.
McLean, VA 22101
703-582-8466

Charles V. Berwanger
Gordon & Rees
101 W. Broadway
Suite 1600
San Diego, CA 92101
619-696-6700

Counsel for Petitioner Mt. Soledad Memorial Association