Case No. D047702
(San Diego County Superior Court No. GIC 849667)

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

PHILIP PAULSON,

Respondent,

vs.

CHARLES ABDELNOUR, in his capacity as City Clerk of the City of San Diego, *et al.*,

Appellants.

Appeal from the Judgment of the Superior Court of the State of California,
Superior Court Case No. GIC 849667, County of San Diego,
The Honorable Patricia Y. Cowett, Judge

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE NATIONAL LEGAL FOUNDATION IN SUPPORT OF APPELLANT CHARLES ABDELNOUR

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE PRESIDING JUSTICE AND HONORABLE ASSOCIATE JUSTICES:

Pursuant to California Rules of Court, rule 13(c), *Amicus Curiae,* The National Legal Foundation, respectfully requests permission to file the accompanying brief in support of Appellants San Diegans for the Mt. Soledad National War Memorial, Mike Shelby, the City of San Diego, and Charles Abdelnour, in his capacity as City Clerk of the City of San Diego, *et al*.

Amicus Curiae, The National Legal Foundation (NLF), is a 501(c)(3) non-profit public interest law firm based in Virginia Beach, Virginia. The NLF is dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. Since its founding in 1985, the NLF has litigated important First Amendment cases in both the federal and state courts.

The NLF has gained valuable expertise in the area of Establishment Clause jurisprudence and has done extensive research of California law, which it believes will assist this Court in deciding this appeal. The NLF has an interest, on behalf of its constituents and supporters, in seeing that the transfer of ownership of the Mt. Soledad Veterans Memorial is completed consistent with the desires of the voters of the City of San Diego since this issue directly impacts whether the public square will be stripped

of all vestiges of our religious heritage. The NLF believes that the California constitution is not offended when a cross is included as part of a war memorial.

DATED: July 31, 2006

Respectfully submitted,

_____

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I. DECISIONS BY THE FEDERAL COURTS IN OTHER PROCEEDINGS SHOULD NOT BE CONSIDERED THE LAW OF THE CASE BECAUSE THESE DECISIONS DO NOT QUALIFY AS SUCH UNDER CALIFORNIA'S LAW OF THE CASE DOCTRINE.

In its opinion, the trial court noted that the Petitioner had argued that "the unconstitutionality of the transfer has already been decided by federal courts and is the law of the case . . . ." (*Paulson v. Abdelnour* (Super. Ct. Oct. 7, 2005) No. GIC849667 slip op. at 3.) Without expressly stating that it agreed (nor that it disagreed) that the law of the case doctrine is applicable to the instant case, the trial court *implied* either that it would apply the doctrine or at least assume without deciding that it was applicable. Thus, the court wrote, "[a]t a minimum, prior findings of fact and conclusions of law covering the Mt. Soledad Veterans Memorial are instructive. The Court deems the following excerpts as relevant[.]" *Id*. The court then cut and pasted twenty-two pages of excerpts from various federal opinions involving the Mt. Soledad Memorial.

As will be demonstrated immediately below, the law of the case clearly has no application in the instant litigation. Further, even if it did, the instant case would fall under the exceptions to the doctrine.

A. <u>There Can Be No Law of the Case Since This Case Was Before the Trial Court for the First Time</u>.

First and foremost, since this case was not before the trial court on remand, no law of the case can exist. As the Supreme Court of California

has explained only two months ago,

> where an *appellate court* states a rule of law necessary to its decision, such rule must be adhered to in any *subsequent appeal* in the *same case*, even where the former decision appears to be erroneous. Thus, the law-of-the-case doctrine prevents the parties from seeking appellate reconsideration of an already decided issue in the *same case* absent some significant change in circumstances.

(*People v. Boyer*, (2006) 38 Cal.4th 412, 441 (internal quotations and citations omitted) (emphasis added).) Similarly, "the law-of-the-case doctrine governs only the *principles of law* laid down by an appellate court, as applicable to a retrial of fact, and it controls the outcome on retrial only to the extent the evidence is substantially the same." *Id*. at 442 (emphasis added).

Since there has been no appeal (prior to this one) in the instant case and no re-trial, the law of the case doctrine is inapplicable. Furthermore, in *In re Rosenkrantz* (2002) 29 Cal.4th 616, the California Supreme Court made it clear that the law of the case doctrine does not apply simply because some parties are the same or some facts are the same.

There, convicted murderer, Robert Rosenkrantz, had been granted parole by the Board of Prison Terms, in compliance with decisions by the state courts. *Id*. at 624-25. However, the Governor reversed the Board. (*Id*.) Rosenkrantz challenged the Governor's action, and the Court of Appeal, Second Appellate District invoked the law of the case doctrine to uphold the Superior Court's ruling in favor of Rosenkrantz. However, even

though both cases involved the same prisoner and the same petition for parole, the Supreme Court noted that "[t]he prior appeal that was deemed by the appellate court to constitute the law of the case involved a different case, different parties, and a different underlying decision denying parole, and therefore does not support application of the law of the case doctrine."

Similarly here, even though the instant case involves the same Memorial and the same Plaintiff, the opinions that the trial court cited in its opinion involve different cases, different parties (meaning, as was also meant in *Rosenkrantz*, partially different parties), and different underlying issues, actions, and decisions. Obviously, the constitutionality of Proposition A has not been at issue in any of the cases cited by the trial court.

B. Even Should This Court Decide That the Law of the Case Doctrine Potentially Applies, the Application of the Doctrine is Subject to Three Qualifications, None of Which are Met Here

Despite the clear inapplicability of the doctrine under the above analysis, it is also inapplicable for other reasons. As noted above, the law of the case doctrine applies only to legal, not factual issues. Furthermore, the law of the case applies only where three elements are met: "Application of the rule is now subject to the qualifications that the point of law involved must have been necessary to the prior decision, that the matter must have been actually presented and determined by the court, and that application of

the doctrine will not result in an unjust decision." (*People v. Shuey* (1975) 13 Cal. 3d 835, 842 (internal quotations and citations omitted).)

1. The Law of the Case Doctrine is Inapplicable Here Because this Case Presents Variable, not Stable Issues.

First, the law of the case doctrine is only applicable to "points of law necessary to the prior decision." *Id.* The *Shuey* Court categorized issues as either "stable" or "variable" in order to determine the issues to which the doctrine of the law of the case can be applied. (*Shuey* 13 Cal. 3d at 842-43 (quoting Note, *Law of the Case*, 5 Stan. L. Rev. 751, 759 (July 1953)).) Stable issues are those in which evidence at the new trial was the same as in the original trial.[1] (*Id*.) Therefore, legal determinations about that evidence, *e.g.*, a determination of its sufficiency, ought not change. (*Id.*) Variable issues are those in which new evidence can significantly alter the determination of the issue. (*Id*.) The law of the case doctrine applies only to "stable," not "variable," issues. (*Id.* at 842-43.)

Here, the constitutionality of Proposition A presents a variable issue because so many alterations to the Memorial have occurred and because the mechanism and effect of the Proposition is significantly different from the issues before the courts that the trial court invoked. San Diegans for the Mt. Soledad National War Memorial ("San Diegans") (designated

[1] Of course, there is no "new" and "original" trial in the instant case. In order to track the teachings of the *Shuey* Court, this and similar language will be used as a proxy for the proceedings in the court below and the twenty-two pages of excerpts that the trial court invoked.

"Aggrieved Party and Appellant" in their Brief to this Court), discuss evidence of changes to the Memorial. These changes include the addition of six concentric granite walls; over 1,600 plagues, some of which contain Stars of David; bollards; brick pavers; and a large American flag atop a tall flagpole. (Br. of Aggrieved Party and Appellant-San Diegans for the Mt. Soledad National War Memorial 17-24). This "new evidence" surely warrants independent analysis under the *Shuey* Court's rubric of stable and variable issues.

2. The Law of the Case Doctrine is Inapplicable Here, the Matters at Issue in the Instant Case Have Not Been Presented and Determined by Prior Courts.

Second, for the law of the case doctrine to apply, "the matter must have been actually presented and determined by the court . . . ." (*Shuey*, 13 Cal. 3d. at 842.) Here, Proposition A has simply never been before any of the courts that the court below invoked. This would, absent more, be sufficient to make the doctrine inapplicable. However, the combined result of this and the factual changes noted above, make it even more glaringly clear that "the matter [cannot] have been actually presented and determined by the court[s]" cited in the trial court's opinion. (*Id*.)

3. The Law of the Case Doctrine is Inapplicable Here Because Its Application Would Result in an Unjust Result.

Third, applying the law of the case doctrine must "not result in an unjust decision." (*Id.* at 842.) Most pertinent here, the *Shuey* Court noted

that an unjust result occurs as a result of "manifest misapplication of existing principles." (*Id.* at 845.) The federal courts invoked by the trial court have manifestly misapplied California law, as will be demonstrated in Section II, below. Thus, in this situation, the "manifest misapplication" principle goes hand-in-hand with the black letter law proposition that federal decisions do not control on matters of state law, (*see, e.g.*, *Levine v. Weis*, (2001) 90 Cal. App.4th 201, 208).

Thus, in sum, the law of the case clearly has no application in the instant litigation. Further, even if it did, the instant case would fall under the exceptions to the doctrine: "the rule is now subject to the qualifications that the point of law involved must have been necessary to the prior decision, that the matter must have been actually presented and determined by the court, and that application of the doctrine will not result in an unjust decision." (*Shuey*, 13 Cal. 3d at 842.) Having discussed the first two qualifications above, this brief will now examine the "manifest misapplication" exception.

II. THE JUDGMENT BELOW SHOULD BE REVERSED BECAUSE THE COURT MANIFESTLY MISAPPLIED CALIFORNIA LAW.

In examining the "manifest misapplication" exception to the law of the case doctrine, the twenty-two pages of excerpts relied upon by the court below stand in the place of various intermediate or final courts of appeals in a "real" law of the case scenario. Thus, this Brief will demonstrate that the

"three themes" that the Ninth Circuit claimed in *Paulson v. City of San Diego* (9th Cir. 2002) 294 F.3d 1124, to have synthesized from California cases represents a manifest misapplication of existing principles of California law. Moreover, as noted in Section I above, the Ninth Circuit's[2] pronouncements on California law are not binding in any event. Thus, from this point forward, the analysis in this Section of the brief will be doing "double duty." However, the brief will not apply every point to both contexts, as the applications will usually be obvious.

The Ninth Circuit's first theme is that "article XVI, section 5, is so broad that state or local governments need not provide a financial benefit or tangible aid in order to violate the provision; they violate it by doing no more than lending their prestige and power to a sectarian purpose." (*Id*. at 1130 (internal quotations and citations omitted).) The second theme is that "even a government act that has a secular purpose can violate article XVI, section 5, if it also has a direct, immediate, and substantial effect of promoting a sectarian purpose." (*Id.*) The third theme, which the Ninth Circuit considered a corollary to the second, is that "government conduct that aids religious or sectarian purposes, but that does *not* have a direct, immediate, and substantial effect, does not contravene" article XVI, section

[2] Because several of the cases relied upon by the court below carry the name Paulson (as does the case below and this appeal), this Brief will use "the Ninth Circuit" to refer to *Paulson v. City of San Diego* (2002) 294 F.3d 1124.

5." (*Id*. at 1131.) We will examine each theme in turn.

A. The Ninth Circuit's "Prestige and Power" Theme is a Manifest Misapplication of California Law Because This View Has Never Been Adopted by the California Supreme Court.

The first theme the Ninth Circuit identified was that Article XVI, section 5 could be violated if the state lends its prestige and power to a sectarian purpose. (*Id*. at 1130.) The Ninth Circuit's only authority for this proposition was *Feminist Women's Health Center, Inc. v. Philibosian* (1984) 157 Cal.App.3d 1076. At issue in that case was the constitutionality of permitting the private burial of 16,500 fetuses when the state defendants knew that burial would be accompanied by a religious ceremony. The court's opinion was devoted largely to its California Establishment Clause analysis and included an examination of principles derived from federal Establishment Clause analysis. (*Id*. at 1085-92.) That analysis was followed by a three-paragraph discussion of the No Preference Clause. (*Id*. at 1092.) Finally, the court turned to the No Aid Clause. After stating the rules it would apply, the totality of its No Aid analysis was the following two sentences: "We perceive that the intended burial ceremony will enlist the prestige and power of the state. This is constitutionally forbidden." (*Id*.)

It seems strange that the Ninth Circuit would take the one-sentence, unsubstantiated "perception" of the Court of Appeal, Second Appellate

District, as one of three major themes that controls No Aid jurisprudence. This is especially telling—and supports the assertion that the putative "prestige and power" theme is a manifest misapplication of California law—since the California Supreme Court has never adopted this approach. Indeed, the likely reason for citing *Feminist Women's Health Center's* paltry analysis is because that is the only way to derive the concept from a majority opinion. By contrast, *Feminist Women's Health Center's* itself acknowledged that it was taking the language from a concurring opinion. (*Id. quoting Fox* v. *City of Los Angeles* (1978) 22 Cal.3d 792, 804 (Bird, C.J., concurring)). Similarly, the only other times the concept appears in California Supreme Court opinions is in concurring and dissenting opinions, two of which were discussing the federal Establishment Clause. (*See Sands v. Morongo Unified School Dist.*, 53 Cal. 3d 863, 889 (Lucas, C.J., concurring) (discussingh te federal Establishment Clause); *id*. at 913 (Mosk, J. concurring); *id*. at 944 (Baxter, J., dissenting).) In light of all of the above, the "prestige and power" rationale is a manifest misapplication of California law.

B. The Ninth Circuit's "Direct, Immediate, and Substantial Effect" Theme is a Manifest Misapplication of California Law Because it is not Applicable to Religious Display Cases.

The Ninth Circuit's second theme fares no better. The Ninth Circuit claimed that "even a government act that has a secular purpose can violate article XVI, section 5, if it also has a direct, immediate, and substantial

effect of promoting a sectarian purpose." (*Paulson,* 294 F.3d at 1130.) However, each of the cases cited in support of this theme were cases in which public funds directly supported religious organizations. (*See Frohliger v. Richardson* (1923) 63 Cal.App. 209 (holding that state funds could not be used to restore historic California missions owned by the Catholic church); *County of Los Angeles v. Hollinger* (1963) 221 Cal.App.2d 154 (holding that the County could not directly fund a film about a holiday parade because it would benefit a religious organization); *California Teachers Association v. Riles* (1981) 29 Cal.3d 794 (holding that state owned textbooks could not be lent to students attending sectarian schools; the program cost the state $2 million (in 1996-97 dollars)).) Thus, at most, this theme applies to that particular subset of No Aid cases in which direct funding helps a religious organization.

Thus, assuming *arguendo* that this second theme has some application to some categories of No Aid cases, the Ninth Circuit stated it as if it applies to all categories of No Aid cases. If this were true, the Ninth Circuit should surely have demonstrated its application to a religious display case. Of course, as noted, it did not. There is a reason for this: Not a single California court has ever declared a religious display unconstitutional under the No Aid Clause.[3] This, too, is surely a manifest

[3] In support of this statement, *Amicus* has Shepardized the No Aid Clause as currently numbered and has done several searches in electronic databases

misapplication of California law.

C. The Ninth Circuit's Permissible Aid Theme is a Manifest Misapplication of California Law Because That Court Erroneously Concluded That Aid Less Direct, Immediate, and Substantial Than That Allowed Under the California Constitution Violated the No Aid Clause.

The Ninth Circuit's third "theme" is that "[g]overnment conduct that aids religious or sectarian purposes, but that does *not* have a direct, immediate, and substantial effect, does not contravene the provision." (*Paulson*, 294 F.3d at 1131 (emphasis in original).) This theme *is* logically the corollary of the second theme. Furthermore, it is also compatible with the assertion that the second theme was too broadly stated. Thus, the problem with the theme is not with the Ninth Circuit's articulation of it but rather with its application of it.

Each case that the Ninth Circuit cited involved aid that was *more* direct, immediate, or substantial than the sale of the Mt. Soledad cross that was at issue before the Ninth Circuit. For example, the Ninth Circuit cited

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for the key terms in the Clause to take into account its previous locations within the California Constitution. Each case was individually examined. To its credit, the Ninth Circuit admitted as much with regards to the California Supreme Court and Court of Appeal:

> Neither the California Supreme Court nor any California Court of Appeal has considered the application of article XVI, section 5, to facts resembling those presented in this case, even though the decided cases cover a wide range of disparate topics. Nonetheless, we distill three themes from the precedents.

(*Paulson* 294 F.3d at 1130.)

East Bay Asian Local Development Corp. v. California. (2000) 24 Cal.4th 693. There, the Supreme Court of California upheld the exemption of religious organizations from historical landmark regulations. The Court found no violation of the No Aid Clause despite the well-taken point of the dissent that

> religious organizations alone may be able to avoid the economic burdens and developmental restrictions imposed by historic landmark preservation laws. Thus, a church or other sectarian entity can, if it chooses, destroy a historic building for the purpose of erecting an office building simply for financial advantage. But a secular nonprofit organization or an individual owner would be required to maintain the same building no matter how great its potential for development.

(*Id*. at 726 (Mosk, J., dissenting).) In other words, even this considerable benefit did not constitute sufficient aid to violate the Clause.

In another case cited by the Ninth Circuit, *California Educational Facilities Authority v. Priest* (1974) 12 Cal.3d 593, the Supreme Court of California allowed the state to issue bonds to provide below-market loans for private colleges (including sectarian ones) to build facilities, which were not to be used for sectarian purposes. Once again, the Court found that this significant financial benefit did not violate the No Aid Clause. (*Id.*)

Another of the cases cited by the Ninth Circuit was *Woodland Hills Homeowners Organization v. Los Angeles Community College District*, (1990) 218 Cal.App.3d 79. Here again, a significant benefit to a religious organization was found not to violate the No Aid Clause. At issue was a

seventy-five-year lease to The New Reform Congregation that arguably resulted in a savings to the religious organization of $500,000 during the first five years. (*Id*. at 87.)[4]

Thus, each of the cases relied upon by the Ninth Circuit to demonstrate aid that was not "direct, immediate, [or] substantial," *Paulson* 294 F.3d at 1131, actually represented aid that was more "direct, immediate, [or] substantial," *id*., than any possible aid involved in the land sale at issue before the Ninth Circuit. As just one example, the just described $500,000 savings in the *Woodland Hills* case dwarfs whatever savings might have been involved in the sale of the Memorial. The Ninth Circuit tried to show through hypotheticals how the bid requirements aided religious bidders over non-religious bidders. Even were these hypotheticals convincing—which *Amicus* does not believe to be the case—the amounts (a $35,000 required minimum bid and a $106,000 winning bid) cannot compare to a $500,000 savings over just the first five years of a seventy-five year lease.

Thus, the Ninth Circuit's third theme again represents a manifest misapplication of exisiting principles of California law. Furthermore, the instant case does not involve a sale to a "religious" bidder. Rather, it

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[4] The Ninth Circuit also cited one of its own decisions *Christian Science Reading Room Jointly Maintained v. City & County of San Francisco* (9th Cir. 1986) 784 F.2d 1010 *amended by* 792 F.2d 124 (9th Cir. 1986). However, we are only concerned with the Ninth Circuit's misapplication of California law.

involves a transfer to the federal government. Therefore, any attenuated benefit to religion is even less "direct, immediate, or substantial" than that at issue before the Ninth Circuit.

In sum, each of the Ninth Circuit's three themes represents a manifest misapplication of existing principles of California law. This provides the final reason why the themes cannot constitute the law of the case (as discussed above in Section I). However, even independent of the discussion of the law of the case, all of the matters discussed in this Section constitute an independent reason to reject the Ninth Circuit's approach.

III. TRANSFERRING THE LAND TO THE FEDERAL GOVERNMENT IS A VALID WAY TO END ANY CONSTITUTIONAL VIOLATION BECAUSE SUCH TRANSFERS ARE THEMSELVES CONSTITUTIONAL ABSENT "UNUSUAL CIRCUMSTANCES," NONE OF WHICH EXIST HERE.

Instead of the flawed approaches discussed in Sections I and II, the court below should have used the "unusual circumstances" test found in *Freedom from Religion Foundation, Inc. v. City of Marshfield* (7th Cir. 2000) 203 F.3d 487, 491-92, to determine whether Proposition A was constitutional. Courts employing the *Marshfield* test have held that a land transfer is a valid method of curing an Establishment Clause violation unless unusual circumstances exist. Unusual circumstances include a straw-man sale, a sale that does not comply with applicable law, or a sale so far below fair market value that it constitutes a gift to a religious

organization. (*Mercier v. Fraternal Order of Eagles* (7th Cir. 2005) 395 F.3d 693, 702 (*citing Marshfield*, 203 F.3d at 492).)

This test is equally appropriate to analyzing transfers under the California Constitution. As *Mercier* 395 F.3d at 701, makes clear, *Marshfield* considered not only standard Establishment Clause concerns such as excessive entanglement and endorsement of religion, but also whether land transfers demonstrated a preference for religion. Thus, although *Marshfield* was decided under the federal Establishment Clause, its analysis took into account the concerns of the California Constitution's No Preference Clause. Since Establishment Clause and No Preference Clause concerns are addressed by the *Marshfield* test, it can and should be adopted here. This is true despite the fact that the *Marshfield* test may not be germane to the No Aid Clause. As noted above, no California Court has ever held a religious display unconstitutional under the No Aid Clause. Since religious displays themselves are not violative of the No Aid Clause, neither can the transfer of the display violate that clause.

A. Proposition A is Not a Strawman Transfer Because the City Will Not Retain Any Form of Ownership in or Control Over the Property.

The first element of the *Marshfield* test is whether the transfer is a straw sale. Of course, in the instant case, this element must be applied to

the land give-away as opposed to a land sale.[5] However, this does not complicate the analysis in any way. The concern of the first element is whether San Diego would continue to exercise "the duties of ownership." (*Marshfield* 203 F.3d at 492.) The purpose of Proposition A would allow San Diego to transfer its interest in the Mt. Soledad Memorial to the federal government, and the city would not retain *any* incident of ownership. (*See Paulson v. Abdelnour* Super. Ct. Oct. 7, 2005) No. GIC849667 slip op. at 1 (describing terms of transfer under Proposition A and Department of Interior regulations).)

Furthermore, the act of Congress that directs the Department to form an agreement with the Mt. Soledad Memorial Association has nothing to do with San Diego attempting to exercise the rights of ownership. Quite to the contrary, while the federal government and the Association will both be involved with the maintenance of the Memorial, San Diego will have no involvement whatsoever.

B. Proposition A Fully Complies with Applicable Law Because it is in Full Compliance with the San Diego Charter.

Marshfield's second unusual circumstance is a transfer that does not comply with applicable law. This circumstance also does not exist in the instant case since San Diego was fully authorized by the city charter to donate the Memorial to the federal government. Under Article One, section

[5] This will also be true of each subsequent "unusual circumstance" even though the Brief will not stop to note the point.

one of the San Diego Charter, the city may "dispose of [property] as the interests of said City may require." (San Diego, Cal., City Charter, *available at* http://clerkdoc.sannet.gov/Website/city-charter.) Proposition A was passed by 76% of the voters, Smart Voter: League of Women Voters, http://www.smartvoter.org/2005/07/26/ca/sd/prop/A/ (last visited 7/19/06), well above the two-thirds majority that the trial court ordered. (*Paulson v. Abdelnour* (Super. Ct. Oct. 7, 2005) No. GIC849667 slip op. at 1.) The voters of San Diego demonstrated their belief that it was in the city's interest to donate rather than destroy part of the Memorial. This is not hard to fathom. While a minority of San Diegans voted against Proposition A, most San Diegans, as most Americans, undoubtedly find it appropriate to honor their war dead and would be offended by destroying part of such a memorial. It is not hard to believe that these citizens would find the city better served by donating the land than destroying the cross within the memorial.

The transfer in this case, while perhaps unorthodox, complied with the law and did not constitute an unusual circumstance that would invalidate the transfer. In fact, the *Mercier* court emphasized that features of a land transfer "may be unique . . . [yet] not entail the 'unusual circumstances' that would otherwise override the type of legitimate sale approved by *Marshfield*." (395 F.3d at 703.)

C. The Fair Market Value Requirement is Not Violated In This Case Because the Property is not Being Transferred to a Private Organization, But to the Federal Government.

The last consideration usually examined in transfer cases, whether the land was sold for fair market value, *id.* at 702, is simply not applicable in this case. The property in question is not being sold, but is actually being donated to the federal government for use as a veteran's memorial. This fact might, at first blush, appear to violate the fair market value requirement, but in reality it does not. After all, this requirement, as the entire *Marshfield* test, was fashioned to govern transfer from a governmental to a private organization.

We note parenthetically that this is another reason why the *Marshfield* approach works well under the California Constitution: if a transfer to a religious organization occurs below market value, that organization—at least arguably—receives aid in violation of the No Aid Clause. (However, as per Section II above, that aid would still have to be more significant than in the *Woodland Hills* case.) Here, however, San Diego is donating the Memorial to the federal government. By definition, the transfer is not a gift to a religious organization. Therefore, the fair market value requirement is not applicable.

D. The Efforts of San Diego to Preserve the Cross do not Constitute "Unusual Circumstances" Because They are Intended to End Any Perceived Endorsement of Religion.

Admittedly, the three "unusual circumstances" discussed in *Marshfield* and *Mercier*, constitute the typical unusual circumstances, not an exhaustive list of all possible unusual circumstances. Out of an abundance of caution, *Amicus* will here address why San Diego's efforts to preserve the Memorial do not constitute an unusual circumstance. Throughout the course of events San Diego has defended the placement of the cross and attempted to sell the parcel in two public sales. (*Paulson*, 294 F.3d at 1126-27.) Finally, San Diego decided to donate the Memorial to the federal government. These strategies were intended to cure any violations of the federal or state constitutions, while respecting the intentions of those who erected and have maintained the cross, and to preserve the historical benefit of the cross as a memorial. That is the whole point of the *Marshfield* test: it is permissible (absent, as discussed above, unusual circumstances) to transfer land in lieu of destroying religious displays. Thus, the motivation for the transfer cannot itself be seen as an unusual circumstance. As the Seventh Circuit noted in *Mercier*, "[w]hile the historical benefit would remain, the sale would extricate the City from any perceived endorsement of the religio[n]." (*Mercier* 395 F.3d at 702.)

In 1952, San Diego allowed the Association to erect the cross to replace a previous cross that was damaged. (*Paulson*, 294 F.3d at 1125.) It

is illogical and unnecessary for the government to dismantle a monument erected by a private organization when courts have upheld another solution allowing the government to transfer property to alleviate an alleged constitutional violation while preserving the purpose of the monuments.

The Seventh Circuit stated that while removal of religious displays is an option, it is not necessary when other alternatives are available. (*Mercier* 395 F.3d at 702; *Marshfield* 203 F.3d at 497.) When analyzing whether transfers are a viable alternative, the Seventh Circuit has looked to the history of the display at issue. "The purpose for which the Monument has remained in the Park for forty years is important in understanding why the City would choose to keep it where it was rather than allow it to be removed." (*Mercier* 395 F.3d at 704.) The cross on Mt. Soledad has served as a memorial for those who served our country and has been important enough to residents that they have repaired and rebuilt it as needed through the years. (*Paulson* 294 F.3d at 1125.) In transferring the land, instead of removing the cross, the city is honoring the veterans and respecting the history of the cross in the area.

IV. THE COURT BELOW ERRED WHEN IT TOOK COGNIZANCE OF THE RELIGIOUS AFFILIATION OF ATTORNEYS INVOLVED IN THIS CASE.

As a separate matter, the trial court listed as evidence of the violation of the No Aid Clause and the No Preference Clause the fact that a law firm involved in the case is the Thomas More Law Center. (*Paulson v.*

Abdelnour (Super. Ct. Oct. 7, 2005) No. GIC849667 slip op. at 25-26.) The court's premise was that since Thomas More's purpose is "the defense and promotion of the religious freedom of Christians," their involvement in the case further emphasizes the supposed preference of religion. (*Id.* at 25) Not only does that premise amount to a religious test as the San Diegans for the Mt. Soledad National War Memorial argues, (Br. of Aggrieved Party and Appellant-San Diegans for the Mt. Soledad National War Memorial 17-24), but the premise does not make any sense in the adversarial system.

This Court should reverse this pernicious holding. If this decision is allowed to stand, then anytime a party seeks to defend anything "religious" or seeks to vindicate its free exercise rights, it will be in trouble should it procure the services of a "religious" public interest law firm. Similarly—at least arguably—under the logic of the court below, anytime an atheist or a member of a minority religion seeks to challenge a putatively "religious" practice of a governmental entity, that party will also borrow trouble should it procure the services of a public interest law firm whose views are sympathetic to its own. Such a result cannot be permitted.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be reversed.

Respectfully submitted,
this 31 day of July, 2006,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word 2003 for Windows software, this brief, from page 1 through and including the signature lines that follow the brief's conclusion, contains 5,219 words. I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on July 31, 2006.

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Brian Chavez-Ochoa
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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached *Amicus Brief* in the case of *Paulson v. Abdelnour*, No. D047702, on all required parties by depositing the required number of copies of the same in the United States mail, first class postage, prepaid on July 31, 2006, addressed as follows:

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