



constitutionally protected. The ACLU has and will continue to ensure that such constitutional rights for religious communities and individuals are fully protected.

The ACLU opposes, however, *governmental* promotion, endorsement, and financing of religious symbols. The question is not the permissibility of “religion in the public square” – which is constitutionally *protected* – but the *government’s* involvement in promoting religious symbols and beliefs, which is constitutionally *prohibited*. Erecting a Latin cross on the lawn of a Catholic or Lutheran Church is constitutional. But putting that same cross on the courthouse lawn on the opposite side of the street is unconstitutional. The prohibition comes not because the cross – or any other religious symbol – is disfavored. Rather, it comes from the fact that it is a





The Federal District Court found that “[w]here . . . the Latin cross appears as a permanent, salient symbol on public property and on a public imprimatur, California’s constitution will not permit it to continue to stand.” *Murphy v. Bilbray*, 782 F. Supp. 1420, 1438 (S.D. Cal. 1991). The Court ordered the City to remove the Latin cross, and gave the City three months to comply with its order. On appeal, the Ninth Circuit upheld the district court’s determination and concluded that, even assuming the Mt. Soledad Latin cross could properly be characterized as war memorial, it is “[a] sectarian war memorial [that] carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion.” *Ellis v. City of La Mesa*, 990 F.2d 1518, 1527 (9th Cir. 1993).

In October 1994, the City made its first attempt to remedy the constitutional violation via a ballot initiative in which it urged voters to “SAVE THE CROSS ON MOUNT SOLEDAD,” not by the constitutionally permissible means of moving it to a non-governmental site, but by authorizing a no-bid sale of ase

the Mt. Soledad property and war memorial, and the Latin cross would be replaced with a non-sectarian symbol that would appropriately recognize all veterans in exchange for an end to litigation. These settlement terms would be perfectly acceptable to Plaintiffs here and would have preserved the continued existence of the Latin cross — but in a constitutional way. The settlement terms were presented to the City Council on July 20 and 27, 2004. But instead of accepting the settlement outright, the Council attempted one last sale to the highest bidder, who alone could decide whether to keep, remove, or replace the Latin cross. At the public meeting of the City Council, the Mayor and four of five Council members, who voted to put the proposition (known as Proposition K) on the ballot over strong Association and prominent veterans-group opposition, expressly stated that the reason for their vote was to allow the Latin cross to remain on Mt. Soledad. One Councilmember even cited his membership in the “Jesus Christ fan club” as a reason for his vote.

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

### **The Intervention of (former) Congressman Randy “Duke” Cunningham and the Federal Government**

Undeterred by the will of San Diego voters and the Federal Court’s prior exhortation to settle the case consistently with constitutional requirements, the City refused to comply with the binding ordinance. Instead, with the active encouragement of the Thomas More Law Center (“Thomas More”), an advocacy group whose stated mission is the “promotion of the religious freedoms of Christians” and the protection of “Christians and their beliefs in the public square,” the City began its ongoing campaign to circumvent its constitutional obligations.<sup>1</sup>

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

On November 10, 2004, Thomas More sent a letter to Representative Randy “Duke” Cunningham, a Congressman from San Diego and a member of the powerful House Appropriations Committee, to solicit his help in convincing the federal government to override the San Diego referendum and corresponding settlement agreement by declaring the Latin cross

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<sup>1</sup> As Chancellor of England under Henry VIII, Sir Thomas More played an active role in arresting, interrogating, and prosecuting Protestants – Roman Catholicism then being the established state religion. When Henry VIII abandoned Roman Catholicism and replaced it with Anglicanism, More was arrested and tried for treason for refusing to accept Henry as the head

a national war memorial. In so doing, Thomas More made clear that the principal reason for taking such action was because “religion and morality are the foundation of our country” and the Mt. Soledad Latin cross was “one of the most visible symbols of [our Christian faith].”

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

Less than a month later, during the night of November 21, 2004, Representative Cunningham inserted an eleventh-hour rider into the voluminous \$388 billion Fiscal Year 2005 Omnibus Appropriations Act (Pub. L. No. 108-447). The rider, which few had seen before Representative Cunningham inserted it into the appropriations bill, (1) designated the Mt. Soledad Veterans Memorial a national veterans memorial; (2) authorized the Department of the Interior to accept the donation of the Memorial from the City of San Diego; and (3) directed the National Park Service to enter into a memorandum of understanding with the Association for the maintenance and administration of the memorial. Pub. L. No. 108-447, § 116, 118 Stat. 3346, codified at 16 U.S.C. § 431 note (2004). Representative Cunningham acknowledged that he had not asked for a written legal opinion from an attorney on whether the bill would allow the Latin cross to remain at its current location, and that he was trying to “save the Cross” as a religious landmark. Thomas More hailed Cunningham’s effort as “an act of God.” At the same time that Representative Cunningham was being praised by Thomas More for his efforts as “an act of God” to save the cross, he was abusing his political office by accepting bribes. Cunningham subsequently pled guilty to this crime and is now serving time in a Federal penitentiary.

With the exception of Thomas More, however, all parties to the long-running dispute acknowledged that Representative Cunningham’s proposed legislation would not solve the constitutional problem that the California state and federal courts had unanimously reaffirmed multiple times over the preceding thirteen years. On December 8, 2004, President Bush signed the omnibus appropriation bill, with Representative Cunningham’s rider intact, into law. Soon thereafter, Thomas More and Representative Cunningham successfully pressed San Diego Mayor Dick Murphy to add the proposed federalization of the Latin cross by way of donation promptly to the City Council Agenda. Prior to the City Council meeting, however, San Diego City Attorney Michael Aguirre issued a formal legal opinion that the federalization of the Latin cross by way of donation would be a violation of the California Constitution and fall far short of a remedy that would be deemed acceptable by the California state and federal courts. Mr. Aguirre’s opinion further observed that, “based on current case law, such a transaction would also violate the federal Constitution and . . . provide fodder for additional legal proceedings against the City.”

On March 8, 2005, after a six-hour public hearing, the San Diego City Council voted against donating the Latin cross to the federal government. Soon after the City Council’s decision, Thomas More and others, spurred on by Rep. Cunningham and Mayor Murphy, spearheaded a petition and referendum drive under the aegis of a Thomas More-affiliated group

called “San Diegans for the Mt. Soledad National War Memorial” to rescind the Council vote. This wide-ranging and well-financed effort included 75 paid signature gatherers, massive fundraising efforts, and a petition written by Thomas More that began with the proposition, “You Can Save Our Cross.” Press reports described sermons from the Latin cross site and other public and religious venues, including events at Qualcomm Stadium and Cox Arena on Easter Sunday, that urged civil disobedience to flout the original Court order and save the Latin cross.

At a May 17, 2005 meeting to consider the petition, two City Council members, while expressing misgivings about the mounting legal costs the City was incurring, agreed to switch their initial vote and to send the issue back to the voters. The Council accordingly voted 6-3 to allow a public referendum, Proposition A, on the Latin cross. The vote on Proposition A was scheduled to coincide with the July 26, 2005 special election to replace Mayor Murphy. After the City Council’s vote was announced, Latin cross supporters sang “Onward Christian Soldiers” in the Council chamber.

In a separate case brought in California State Courts challenging Proposition A, Judge Cowett issued a 35-page final decision on October 7, 2005, striking it down as unconstitutional. *Paulson v. Abdelnour*, No. GIC-849667 (Cal. Sup. Ct. Oct. 7, 2005). The decision recounts the extensive legal history of the dispute and the consistent and unequivocal rulings by state and federal courts over the years. Based on “the consistent, repeated, and numerous references to saving the Cross as the basis for deciding whether to donate the memorial to the United States,” Judge Cowett held that “one conclusion is inescapable: this transfer is again an unconstitutional preference of the Christian religion to the exclusion of other religions and non-religious beliefs in violation of the No Preference Clause of the California Constitution.” *Id.* at 28. In addition, Judge Cowett ruled that the City’s attempt “to go so far as to transfer away valuable land for no compensation for the purpose of saving the cross is also an unconstitutional aid to the Christian religion in violation of the California Constitution.” *Id.*

Judge Cowett likewise observed that maintaining the Latin cross as a part of a national veterans memorial would “run[] afoul of the Establishment Clause of the United States Constitution.” *Id.* Judge Cowett concluded: “Even today, it still can be said that at best the Mt. Soledad Memorial has a secondary secular purpose (or at worst is but a sham secular purpose) and that the predominant purpose of the memorial is a religious purpose.” Judge Cowett concluded by stating Judge Thompson’s initial pronouncement back in 1991 – that if the City “truly wish[ed] to honor the war dead, then it should do so other than with the Latin cross which it has permitted to stand atop Mt. Soledad” — “still stands the test of time and history as related to this cross.”

After an additional ruling by the Federal Court, Mayor Sanders and certain organizations lobbied President Bush and the U.S. Congress to help them evade the effects of the California Constitution by condemning and effectuating a taking of the Mt. Soledad Latin cross by the federal government. On May 10, 2006, Congressman Duncan Hunter, who assumed leadership on the Latin cross issue in Congress after Rep. Cunningham was incarcerated for the crimes of bribery and tax evasion, asked the President to “use the authority found in 40 U.S.C. 3113 to begin immediate condemnation proceedings” concerning the Latin cross.



On June 27, 2006, Rep. Hunter introduced a bill to “effectuate the purpose” of Rep. Cunningham’s previous bill from 2004. The new proposal declares that “there is hereby vested in the United States all right, title, and interest in and to, and the right to immediate possession of, the Mt. Soledad Veterans Memorial in San Diego, California.” The bill directs the United States to pay “just compensation to any owner of the property.” The bill states that upon acquisition of the memorial by the United States, “the Secretary of Defense shall manage the property and shall enter into a memorandum of understanding with the Mt. Soledad Memorial Association for the continued maintenance of the Mt. Soledad Veterans Memorial by the Association.”

### **Conclusion**

The American veterans who gave their lives for their country did so under the banner of the American flag, as properly commemorated by the Iwo Jima Memorial, not as crusaders under the banner of the cross. As a religious symbol, the Latin cross should be sacred. But when politicians and interest groups use the government to promote the cross, they profane it. Those who truly want the Mt. Soledad Latin cross to be saved – rather than to be used as fodder in culture wars – have a perfectly constitutional option available: move the cross to a prominent, visible, *religious* site.