No. 11-998

# In The Supreme Court of the United States

MOUNT SOLEDAD MEMORIAL ASSOCIATION,

*Petitioner,*

v.

STEVE TRUNK, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## RESPONSE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PETER D. LEPISCOPO
*Counsel of Record*
WILLIAM P. MORROW
JAMES M. GRIFFITHS
MICHAEL W. HEALY
LEPISCOPO & MORROW, LLP
2635 Camino del Rio South, Suite 109
San Diego, California 92108
Telephone: (619) 299-5343
Facsimile: (619) 299-4767
e-mail: plepiscopo@att.net

*Counsel for Intervenor*
*Pacific Justice Institute*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED

The Court is acquainted with this matter, having already intervened to halt removal of the cross from the Mount Soledad National Veterans War Memorial in San Diego, California, when Justice Kennedy issued a stay in 2006.[1]

In the present litigation, the district court held that the cross did not violate the Establishment Clause.[2] However, the Court of Appeals for the Ninth Circuit reversed, holding that the presence of the cross in the Memorial violated the Establishment Clause because the primary effect of the Memorial is "predominantly religious."[3]

Pacific Justice Institute pressed the issue of Article III standing throughout the proceedings in the district court and court of appeals. In this regard, the district court dismissed some of respondent Trunk's Establishment Clause claims for lack of Article III standing, as well as dismissing the City of San Diego

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[1] *San Diegans for the Mt. Soledad National War Memorial v. Paulson*, 548 U.S. 1301 (2006), App. 4-9, *infra*.

[2] *Trunk v. City of San Diego*, 568 F.Supp.2d 1199 (S.D. Cal.2008), *see* Appendix 65-123 to Petitioner Mount Soledad Memorial Association's Petition for Writ of Certiorari ("Petition") filed in this case on February 9, 2012.

[3] *Trunk v. City of San Diego*, 629 F.3d 1099, 1110 (9th Cir.2011), *see* Appendix 1-64 to Petition.

**QUESTIONS PRESENTED** – Continued

from the case.[4] As the issue of whether the district court and court of appeals had Article III jurisdiction cannot be waived, and, therefore, should be resolved before reaching any substantive constitutional issue, Pacific Justice respectfully requests the Court to grant the petition and certify the following additional questions for review:

**1.** Whether the Ninth Circuit's "ideologically offended" standard[5] conflicts with this Court's decision in *Valley Forge*[6] because it improperly conferred Respondents with Article III standing to maintain their Establishment Clause claim for the removal of a single element – the cross – from the Mount Soledad National Veterans War Memorial.

**2.** Whether the *Lemon* test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence.[7]

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[4] *Trunk v. City of San Diego*, 547 F.Supp.2d 1144 (S.D. Cal.2007).

[5] *See Ellis v. La Mesa,* 990 F.2d 1518 (9th Cir.1993); *Buono v. Norton*, 371 F.3d 543 (9th Cir.2004); and *Barnes-Wallace v. City of San Diego*, 530 F.3d 776 (9th Cir.2008).

[6] *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

[7] The Court has previously certified review of this question in *McCreary v. ACLU of Kentucky*, 545 U.S. 844 (2005) ("*McCreary*"). *See Question Presented* in *McCreary*, Question No. 3, http://www.supremecourt.gov/qp/03-01693qp.pdf.

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The caption of this response contains all parties to the proceeding.[8] Pursuant to Rule 29.6, Pacific Justice Institute states that it is a California non-profit corporation and enjoys IRC §501(c)(3) status, with no parent or publicly held company controlling any interest in it.

[8] In the proceedings in the district and circuit courts, Robert M. Gates, not Leon E. Panetta, was named as defendant in his official capacity. On July 11, 2011, Leon E. Panetta was sworn in as Secretary of Defense and, in his official capacity, is automatically substituted as a defendant. *See* FED. R. APP. P. 43(c)(2).

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## RESPONSE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pacific Justice Institute ("Pacific Justice") submits the following response in support of the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

## OPINION BELOW

The opinion of the court of appeals is reported at *Trunk v. City of San Diego*, 629 F.3d 1099 (9th Cir.2011) ("*Trunk*"), App. 1-64 to Petitioner Mount Soledad Memorial Association's Petition for Writ of Certiorari filed in this case on February 9, 2012.

## JURISDICTION

The court of appeals filed its opinion denying rehearing *en banc* on October 14, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

CASE OR CONTROVERSY CLAUSE:

"The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the

Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; – to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States, – between Citizens of the same State claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

U.S. CONST. ART. III, § 2, cl. 1.

FIRST AMENDMENT – ESTABLISHMENT CLAUSE:

"Congress shall make no law respecting an establishment of religion * * * * *"

U.S. CONST. AMEND. I.

## STATEMENT OF THE CASE

1. As a preliminary matter, the Court should keep in mind Justice Breyer's warning in the Texas Ten Commandments case concerning the removal of longstanding religious symbols from the public square by the government:

> "[T]o reach a contrary conclusion here, based primarily on the religious nature of the tablets' text would, I fear, lead the law to exhibit a **hostility toward religion** that has no

> place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of **religiously based divisiveness that the Establishment Clause seeks to avoid**."

*Van Orden v. Perry,* 545 U.S. 677, 704 (2005) ("*Van Orden*") (emphasis added). Such divisiveness is exhibited in Respondents' quest to remove a single element – the cross – from the Mount Soledad National Veterans War Memorial ("Memorial").

2. It is undisputed that a cross has stood atop Mt. Soledad in one form or another since 1913, when private citizens placed a redwood cross atop Mt. Soledad (on an approximately 170-acre parcel of land owned by the City of San Diego). In 1916 the land was dedicated as a park by the City of San Diego. In 1952 a wind storm destroyed the cross.

In 1954, a private organization, the Petitioner, Mount Soledad Memorial Association, was granted permission by the City of San Diego to erect the cross in its present form for the express purpose of honoring veterans of World War I, World War II, and the Korean War. The 1954 dedication ceremony was not a religious ceremony, rather it was typical of dedications in that era, including the presentation of the U.S. and military flags by a U.S. Military Color Guard. As can be expected of any dedication of a war

memorial, in attendance were civilians and members of the U.S. Armed Forces (in full uniform).

There is no evidence in the record to support the contention that the 1954 Dedication of the Memorial was to commemorate **only** Christian veterans. In fact the evidence is to the contrary, as there is a large dedication plaque attached to the base of the cross in plain sight where it can be seen and read by everyone who visits the War Memorial. It unequivocally states that the cross was dedicated to ***all*** men and women veterans of all branches of the U.S. Armed Forces. The Dedication Plaque, which was attached to the base of the Memorial in 1989 by the Mount Soledad Memorial Association, reads as follows:

"*MT. SOLEDAD VETERANS MEMORIAL CROSS*
*DEDICATED IN 1954, AS A TRIBUTE TO ALL*
*BRANCHES OF THE ARMED SERVICES OF U.S.A.*
*SERVICEMEN AND WOMEN.*
*THIS PLAQUE DEDICATED*
*NOVEMBER 11, 1989*
*MT. SOLEDAD MEMORIAL ASSOCIATION*
*CITY BEAUTIFUL SAN DIEGO*"

App. 1, *infra*.

Over the years more elements were added to the Memorial. Currently, the Memorial is a multi-component, fully integrated national war memorial that commemorates all war veterans. In its present form, the Memorial is comprised of the following main components: a 26 foot tall white concrete cross; a flag pole with the U.S. Flag; Dedication Plaque; six

concentric walls containing over 1,800 black granite plaques bearing the names and information of individuals who have served in the U.S. Armed Forces; twenty-three bollards numbered 1-23 on the lower-level of the Memorial; benches dedicated to individuals positioned around the perimeter of the Memorial; and brick pavers with names engraved of honored veterans. App. 1, *infra*.

The black granite plaques that are mounted to the walls surrounding the base of the Memorial contain information about veterans such as: name, branch of service, religious symbols, scripture, prayers, and other information specific to each honoree. Many come to the Memorial to place flowers by their family member's plaque much like at a cemetery. App. 3, *infra*. As to the religious component of the plaques, there are no restrictions based on content, religious affiliation, or lack of religious affiliation or beliefs. In fact, it is not unusual to see plaques honoring Jewish and Christian veterans side-by-side with their respective religious symbol etched into their plaques. In addition, the Memorial includes the Barona Indian Tribe's Spiritual Wall of plaques alongside all of the other plaques. App. 2, *infra*. In short, and contrary to Respondents' assertions, the Memorial is the embodiment of religious diversity. In fact, the district court made a finding that: "There is no history of discrimination between religious and nonreligious groups in the issuance of municipal permits to use the site." *Trunk v. City of San Diego*, 568 F.Supp.2d 1199, 1203 (S.D. Cal.2008).

3. The Memorial stood unchallenged for 76 years, but since 1989 it has been embroiled in continual litigation.[9] However, in June 2006, U.S. Representatives Duncan Hunter, Darryl Issa, and Brian Bilbray introduced H.R. 5683, which proposed taking the Memorial by eminent domain. The House approved the bill by a vote of 349 to 74. The Senate approved H.R. 5683 by unanimous consent, which President Bush subsequently signed into law, PUB. L. NO. 109-272, 120 STAT. 770 (2006) (the "Act"). *Trunk v. City of San Diego*, 629 F.3d 1099, 1104 (9th Cir.2011).

The Act authorized the land transfer "in order to preserve a historically significant war memorial, designated the Mt. Soledad Veterans Memorial in San Diego, California, as a national memorial honoring veterans of the United States Armed Forces * * * * *" In support of the acquisition, Congress found that the Memorial has stood as a tribute to U.S. veterans for over 52 years and "now serves as a memorial to American veterans of all wars." The Act also declared that "[t]he United States has a long history and tradition of memorializing members of the Armed Forces who die in battle with a cross or other religious emblem of their faith, and a memorial cross is fully integrated as the centerpiece of the multifaceted Mt. Soledad Veterans Memorial that is replete with secular symbols." *Id*. at 1104-05.

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[9] For a concise summary of the proceedings leading to the instant litigation, *see Trunk*, *supra*, 629 F.3d at 1103-04.

4. Respondents initiated proceedings in the district court contending that by virtue of the presence of the cross in the Memorial, the Act transgressed the Establishment Clause. *Id*. at 1105. The district court held that neither the Act nor the presence of the cross in the Memorial violated the Establishment Clause. *Trunk v. City of San Diego*, 568 F.Supp.2d 1199 (S.D. Cal.2008). However, the court of appeals reversed the district court, holding that the presence of the cross in the Memorial contravened the Establishment Clause because the primary effect of the Memorial is "predominantly religious." *Trunk, supra,* 629 F.3d at 1110.

Finally, the court of appeals denied rehearing *en banc*, with five justices dissenting. Writing for the dissent, Circuit Judge Carlos Bea correctly identifies the crux of this case:

> "The fight to save the Mt. Soledad Veterans Memorial is **not about religion**. It's about protecting a symbol of our freedom and honoring those who have chosen to defend it [at] all costs. Removing this long recognized and respected landmark is an insult to the men and women memorialized on its walls and the service and sacrifice of those who have worn a uniform in defense of our nation. As Representative Hunter explained on the House floor, the Memorial is 'without question a world-class war memorial, **dedicated to all of those, regardless of race,**

> **religion or creed, who have served our armed services**.'"

*Trunk v. City of San Diego*, 660 F.3d 1091, 1100-01 (9th Cir.2011) (*en banc*) (quoting from 152 CONG. REC. H5422, daily ed. July 19, 2006) (emphasis added). Justice Alito made this precise point in the Mojave National Preserve case:

> "The cross is of course the preeminent symbol of Christianity, and Easter services have long been held on Sunrise Rock. But, as noted, **the original reason for the placement of the cross was to commemorate American war dead and, particularly for those with searing memories of The Great War**, the symbol that was selected, a plain unadorned white cross, no doubt evoked the unforgettable image of the white crosses, row on row, that marked the final resting places of so many American soldiers who fell in that conflict."

*Salazar v. Buono*, ___ U.S. ___, 130 S.Ct. 1803, 1822-23 (2010) ("*Salazar*") (internal citation omitted; emphasis added).

## REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

### I. The District Court Addressed The Article III Standing Issue Raised By Pacific Justice

Upon the filing of the complaint in the district court, Pacific Justice contended that Respondents lacked Article III standing to challenge the Act. Accordingly, on June 4, 2007, the district court issued an order to show cause why the case should not be dismissed for lack of Article III standing:

> "Amicus Pacific Justice Institute filed a brief on October 13, 2006 in support of Defendants' motion to dismiss. The Court issued an order on November 7, 2006, noting the amicus brief had raised the issue of Article III standing, and directed the parties to address this issue either in their briefing on the motion to dismiss, or in a subsequent motion."

App. 10-11, *infra*.

On November 7, 2007, the district court dismissed Respondent Trunk's claims for lack of Article III standing and dismissed the City of San Diego from the case:

> "Trunk has not met his burden of demonstrating he has standing to challenge the taking of the Mt. Soledad property by Public Law 109-272. This claim is therefore **DISMISSED** for lack of jurisdiction. His requests

> for a declaration that the taking violated his California state constitutional and U.S. Constitutional rights, and for the Court to encourage the parties to abide by the earlier settlement agreement are likewise **DENIED** for lack of jurisdiction."

*Trunk v. City of San Diego*, 547 F.Supp.2d 1144, 1157 (S.D. Cal.2007) (emphasis in original).

Thereafter a short period of discovery transpired. Then, cross-motions for summary judgment were filed. Once again, Pacific Justice pressed the issue that Respondents did not have Article III standing to maintain their Establishment Clause claims, including being permitted to present oral argument on the Article III standing issue during the hearing on the cross-motions for summary judgment.

On January 4, 2011, the district court issued its decision on the cross-motions for summary judgment, upholding the constitutionality of the Act and the presence of the cross in the Memorial. As an initial matter, the district court addressed the issue of Article III standing. Believing itself to be bound by the Ninth Circuit's decisions in *Ellis v. La Mesa*, 990 F.2d 1518 (9th Cir.1993) ("*Ellis*"); *Buono v. Norton*, 371 F.3d 543 (9th Cir.2004) ("*Buono*"); and *Barnes-Wallace v. City of San Diego*, 530 F.3d 776 (9th Cir.2008) ("*Barnes-Wallace*"), the district court found Respondents had standing, thereby framing the issue for review by this Court:

> "If Plaintiffs' claims were based on any theory other than violation of the Establishment

Clause, they would likely be out of court for lack of standing. Visitors to Mt. Soledad are, after all, mere '[p]assersby . . . free to ignore [the memorial], or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.' **In the Ninth Circuit, however, merely being ideologically offended, and therefore reluctant to visit public land where a perceived Establishment Clause violation is occurring, suffices to establish 'injury in fact.'** *Buono v. Norton,* 371 F.3d 543, 546-47 (9th Cir. 2004) (holding that plaintiff, a practicing Roman Catholic who was ideologically offended by the government's decision to maintain a cross on public land, but not offended by the cross itself, had Article III standing because his opposition to the government's action led him to avoid the area where the cross was located); *Ellis,* 990 F.2d at 1523 (holding that Catholic and Episcopal residents who avoided using public park where cross was located had Article III standing to challenge its presence, because their disagreement with or embarrassment by the government's action prompted them either to avoid the area where the cross was located or to lessen their contact with it); *Barnes-Wallace v. City of San Diego,* 530 F.3d 776, 784-85 (9th Cir.2008) (holding lesbian and agnostic parents had suffered injury in fact because they disagreed with Boy Scouts' religious and moral position and therefore avoided recreational park facilities used by Boy Scouts). Bound by these precedents, the

> Court concludes all Plaintiffs have standing to bring this lawsuit."

*Trunk v. City of San Diego*, 568 F.Supp.2d 1199, 1205 (S.D. Cal.2008) (emphasis added).

## II. The Court Of Appeals Ignored The Article III Standing Issue Raised By Pacific Justice

In the district court and court of appeals, the United States and Mount Soledad Memorial Association did not raise the Article III standing issue. As it did during the entire proceedings in the district court, Pacific Justice raised this issue on appeal, including a request that the court of appeals reconsider its decisions in *Buono*, *Barnes-Wallace*, and *Ellis*. However, the court of appeals ignored this issue. In fact, in its opinion the court of appeals moved from a summary of the facts and procedural background directly into addressing the substantive constitutional issues under the Establishment Clause, never considering whether it had Article III jurisdiction over the case in the first instance. *Trunk*, *supra*, 629 F.3d at 1105.

## III. As Article III Standing Is Jurisdictional It Cannot Be Waived By The Parties, And, Therefore, It Can Be Addressed For The First Time In This Court, Including *Sua Sponte*

The record reflects that neither the court of appeals nor the parties has addressed one of the most

fundamental legal issues in this case – jurisdiction, to wit: Do Respondents have Article III standing to maintain their Establishment Clause claims? Framed another way: Did the district court and court of appeals have jurisdiction over this case under Article III?

As Article III standing is jurisdictional, it cannot be waived by the parties, and, therefore, it can be addressed for the first time in this Court, including *sua sponte*:

> "Federal courts are **not** courts of **general jurisdiction**; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. For that reason, **every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review**,' even though the parties are prepared to concede it. And if the record discloses that the lower court was without jurisdiction, this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit. **This obligation to notice defects in a court of appeals' subject matter jurisdiction assumes a special importance when a constitutional question is presented**. In such cases, we have strictly adhered to the standing requirements

> to ensure that our deliberations will have the benefit of adversary presentation and a full development of the relevant facts."

*Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) ("*Bender*") (internal citations omitted) (emphasis added).

## IV. Question 1: Article III Standing

As to the issue of Article III standing, the Court should grant review in order to create a uniform system of deciding questions of justiciability in Establishment Clause cases and to correct the circuit courts' decisions in conflict with decisions of this Court. *See* SUPREME COURT RULE 10(a) & (c).

### A. Conflicts Between Circuit Courts and Lack of Uniformity in Circuit Courts

Under Establishment Clause challenges, the circuit courts have developed three different and conflicting tests to analyze Article III standing. First, in the case at bar, the district court applied the Ninth Circuit's "*ideologically offended*" standard applied in *Ellis, Buono,* and *Barnes-Wallace. Trunk, supra*, 568 F.Supp.2d at 1205.

Second, there is the "*direct and unwelcomed contact*" test, which confers Article III standing when a plaintiff alleges a direct exposure to an offensive government religious object. This standard is followed in the following circuits: the Fourth, *Suhre v.*

*Haywood County*, 131 F.3d 1083, 1086 (4th Cir.1997); the Fifth, *Doe v. Tangipahoa Parish School Board*, 494 F.3d 494, 497 & n. 3 (5th Cir.2007) (*en banc*); the Sixth, *ACLU of Kentucky v. Grayson County*, 591 F.3d 837, 843 (6th Cir.2010); the Seventh, *Books v. Elkhart County*, 401 F.3d 857, 861 (7th Cir.2005); the Tenth, *Green v. Haskell County Board of Commissioners*, 568 F.3d 784, 793 (10th Cir.2009); and the Eleventh, *Saladin v. City of Milledgeville*, 812 F.2d 687, 692 (11th Cir.1987).

Finally, there is the "*altered behavior*" test, which confers standing when a plaintiff alleges deprivation of the beneficial use of a public place because of the offense caused by a religious display. *See*, *e.g.*, *Hawley v. City of Cleveland*, 773 F.2d 736, 740 (6th Cir.1985); *ACLU of Georgia v. Rabun County Chamber of Commerce*, 698 F.2d 1098, 1103 (11th Cir.1983).

The Court should grant certiorari to resolve the conflicts and lack of uniformity within the circuit courts.

### B. Circuit Courts' Decisions Conflict with this Court's Decision in *Valley Forge*

As illustrated in the preceding subsection, the circuit courts' Article III tests are at odds with this Court's decision in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) ("*Valley Forge*").

*Valley Forge* concerned the federal government's gift of surplus land to a nonprofit Christian college. This Court rejected the plaintiffs' Establishment Clause claim as not justiciable under Article III:

> "[the plaintiffs] failed to identify any personal injury . . . other than the psychological consequence presumably produced by observation of conduct with which one disagrees."

*Id*. at 485.

As in *Valley Forge*, the Respondents in this case allege nothing more than a psychological injury. For example, Respondent Richard Smith explains his injury, "*I directly view the Latin cross and* ***sense*** *the unwelcome exclusionary message it communicates*." Similarly, according to Respondent Trunk, "*The cross makes me* ***feel*** *like a second class citizen* * * * * " Amazingly, a member of Respondent Jewish War Veterans, Maurice Eis, testified that he stopped coming to the Memorial because he felt the Memorial did not represent him: "*I do not know if it is a Christian monument, but it does not speak for me*." This Court's decision in *Valley Forge* notwithstanding, the district court believed it was bound by the Ninth Circuit's decisions in *Buono*, *Ellis*, and *Barnes-Wallace*, thereby concluding that Article III was satisfied. *Trunk v. City of San Diego*, 568 F.Supp.2d at 1205.

The Court should grant certiorari in order to clarify that *Valley Forge* governs Article III standing requirements in Establishment Clause cases and to correct the decision below, as well as disapproving the

Ninth Circuit's improper application of Article III standing requirements in *Buono*, *Ellis*, and *Barnes-Wallace*. Once *Valley Forge* is applied to this case, the Court should conclude that Respondents did not have Article III standing to assert, and the district court and court of appeals did not have jurisdiction to adjudicate, their Establishment Clause claims.

## V. Question 2: Whether *Lemon* Should Be Overruled

In the Kentucky Ten Commandments case, *McCreary v. ACLU of Kentucky*, 545 U.S. 844 (2005) ("*McCreary*"), this Court considered revisiting *Lemon v. Kurtzman*, 403 U.S. 602 (1971) ("*Lemon*"), when it certified the following question for review: *Whether the Lemon test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence*. *See Question Presented* in *McCreary*, Question No. 3, http://www.supremecourt.gov/qp/03-01693qp.pdf.

It is appropriate in this case to adapt Justice Scalia's description of the *Lemon* test in *Lamb's Chapel v. Center for Moriches Union Free School*, 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring in judgment) ("*Lamb's Chapel*"), to describe its effect on the Memorial: "like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening" veterans and visitors

alike who wish to see the Memorial remain intact, including the cross.

In light of *Lemon*'s persistence and the issues raised in this case, now is the time for the Court to revisit and overrule *Lemon*. First, the Court should reassess and overrule *Lemon* in order to correct the confusion within the circuit courts relating to assessing and applying Article III standing in the Establishment Clause context.

Second, the Court should overrule *Lemon* because it has created and fostered government inspired and sponsored hostility towards religion, religious people, and religious institutions.

Third, in overruling *Lemon*, the Court should also repudiate as constitutional doctrine the "*separation between church and state*" metaphor oft-quoted from Thomas Jefferson's January 1, 1802, letter to the Danbury Baptist Association. The letter was intended by Jefferson to be political not a legal dissertation on or interpretation of the Establishment Clause. He wrote the letter as president in order to assuage the fears of members of the Danbury Baptist Association regarding the commingling of state and church affairs. It is important to note that at the time the Constitution was drafted and adopted, Jefferson was in France, and, more importantly, Jefferson was not a member of the First Congress that drafted, debated, and adopted the Establishment Clause.

Fourth, the Court should overrule *Lemon* in order to create a definite and workable test to determine whether governmental action transgresses the

Establishment Clause. If *Lemon* has one virtue it is a lesson on how **not** to interpret and apply the Establishment Clause.

Finally, Pacific Justice requests the Court to overrule *Lemon* and would respectfully suggest that the Court adopt the actual coercion test outlined by Justice Scalia in his dissenting opinion in *Lee v. Weisman*, 505 U.S. 577 (1992) ("*Lee*"):

> "Thus, while I have no quarrel with the Court's general proposition that the Establishment Clause 'guarantees that government may not coerce anyone to support or participate in religion or its exercise,' I see no warrant for expanding the concept of coercion beyond acts backed by **threat of penalty** – a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciples of Blackstone, rather than of Freud. The Framers were indeed opposed to coercion of religious worship by the National Government; but, as their own sponsorship of nonsectarian prayer in public events demonstrates, they understood that '[s]peech is not coercive; the listener may do as he likes.'"

*Id*. at 642 (internal citations omitted).

Clearly, in the case at bar, there is no evidence that the Act or the presence of the cross resulted in any government coercion of or threat of penalty against Respondents. They are free to look or not look at the Memorial, visit or not visit the Memorial.

Either way, the government does not force that decision upon them by coercion or threat of penalty. Accordingly, under *Lee*, Respondents would not have Article III standing and would not have any substantive claim under the Establishment Clause. *Id*.

## CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be GRANTED and the additional two questions presented in this response should be certified for review.

Respectfully submitted,

PETER D. LEPISCOPO
*Counsel of Record*

*Counsel for Intervenor*
*Pacific Justice Institute*

February 16, 2012

App. 1


MT. SOLEDAD VETERANS MEMORIAL CROSS
DEDICATED IN 1954, AS A TRIBUTE TO ALL
BRANCHES OF THE ARMED FORCES OF U.S.A.
SERVICEMEN AND WOMEN.
THIS PLAQUE DEDICATED
NOVEMBER 11, 1989
MT. SOLEDAD MEMORIAL ASSOCIATION
CITY BEAUTIFUL SAN DIEGO

App. 2


SMITH PENICK
1st Lieutenant
U.S. Army
World War II
CARL D. DUSTIN
FC 2/c
U.S. Navy
World War II
USS Herzog DE 178 - Battle of the Atlantic
USS Providence CL 82 - Flagship 6th Fleet
Letter of Commendation,
Good Conduct, American Defense,
European Theater w/ 1 Star,
Victory & Europe Occupation Medals
He served his Family, Community, Nation
and God
GEORGE SWERDLOW
Sergeant
Pacific Campaign
U.S. Army Air Force
World War II
Smile and charm were your
engaging trademark.
Love, commitment,
inspiring wisdom and true
dignity are your forever legacy.
Your grateful wife, Adrienne
THOMAS H. DENMAN
LTJG
U.S. Navy
Pacific Theater
World War II
B.A., B.D., M.A.
Doctor of Humane Letters
Paster of La Jolla Methodist Church
1953 - 1960
Geothermal Energy Pioneer
This loving tribute from your wife
Patrice
I. JOSEPH MATACIA
Commander
U.S. Navy


These plaques honor Tribal members of the Barona Group of
the Capitan Grande Band of Indians who honorably served
in the Armed Forces of the United States in time of war.
BARONA

App. 3


Leo Edgar Tuck
Alice Ray
First Lieutenant
U. S. Army
World War II
Ernesto T. Franco
Specialist Four
U. S. Army
Vietnam

548 U.S. 1301 (2006)
126 S.Ct. 2856, 165 L.Ed.2d 941

**SAN DIEGANS FOR THE MT. SOLEDAD NATIONAL WAR MEMORIAL**,
v.
Philip K. **PAULSON**.

Nos. 05A1233, 05A1234.
United States Supreme Court
July 7, 2006[1]

San Diego's application for a stay pending expedited appeal of the District Court's order to comply with an earlier injunction, affirmed on appeal, barring the city from maintaining a prominent Latin cross at a veterans' memorial on city property is granted; but proposed intervenor's stay application is denied as moot. In No. 05A1224, the equities support preserving the status quo while the city's appeal proceeds. Compared to the irreparable harm of altering the memorial and removing the cross, the harm in a brief delay pending the Ninth Circuit's expedited consideration seems slight. Two other factors make this case "sufficiently unusual," *Heckler v. Redbud Hospital Dist.,* 473 U.S. 1308,1312 (O'Connor, J., in chambers), to justify a stay. First, because a recent Act of Congress deeming the monument a national memorial and authorizing the Secretary of the Interior to take title if the city offers to donate it postdates the Ninth Circuit's previous decisions, its effect on

[1] Together with No. 05A1234, *City of San Diego v. Paulson,* also on application for stay.

the litigation has yet to be considered. Second, San Diego voters have approved a ballot proposition authorizing that donation. A state court has declared the proposition invalid, but if the California appellate court reverses, allowing the memorial to become federal property, its decision may moot the District Court's injunction. And the state appellate court's decision may provide important guidance regarding state-law issues pertinent to the federal court's injunction and the recent federal statute's effect. Separate consideration of the application in No. 05A1233 is unnecessary, since applicant was denied leave to intervene in the District Court and in all events seeks no relief beyond the stay granted in No. 05A1234.

**OPINION**

KENNEDY, Circuit Justice

In this long-running federal-court litigation the United States District Court for the Southern District of California has ordered that, within 90 days of May 3, 2006, the city of San Diego, California, must comply with an earlier injunction, affirmed on appeal, that barred the city from maintaining a prominent Latin cross at a veterans' memorial on city property. The premise of the injunction was that the cross' permanent presence there violates the California State Constitution. See *Murphy v. Bilbray,* 782 F.Supp. 1420, 1426-1427, 1438 (SD Cal.1991), aff'd, *Ellis v. La Mesa,* 990 F.2d 1518, 1520 (CA9 1993),

cert. denied *sub nom. San Diego v. Paulson,* 513 U.S. 925, 115 S.Ct. 311, 130 L.Ed.2d 274 (1994); see also *Paulson v. San Diego,* 294 F.3d 1124, 1133, and n. 7 (CA9 2002) (en banc) (holding that a proposed sale of the memorial violated the State Constitution), cert. denied, 538 U.S. 978, 123 S.Ct. 1786, 155 L.Ed.2d 666 (2003). The city has appealed from the District Court's order to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals has ordered expedited briefing and scheduled oral argument for the week of October 16, 2006; it denied, however, a motion to stay the District Court's order pending appeal. In No. 05A1234, the city of San Diego has applied to me, as Circuit Justice, for a stay pending appeal. In No. 05A1233, the San Diegans for the Mt. Soledad National War Memorial, a proposed intervenor in the case, likewise applies for a stay. On July 3, 2006, I issued a temporary stay pending further order. I now grant the city's application, while denying the proposed intervenor's application as moot.

In considering stay applications on matters pending before the Court of Appeals, a Circuit Justice must "try to predict whether four Justices would vote to grant certiorari should the Court of Appeals affirm the District Court order without modification; try to predict whether the Court would then set the order aside; and balance the so-called 'stay equities.'" *INS v. Legalization Assistance Project of Los Angeles County Federation of Labor,* 510 U.S. 1301, 1304, 114 S.Ct. 422, 126 L.Ed.2d 410 (1993) (O'Connor, J., in

chambers); see also, *e.g., Heckler v. Redbud Hospital Dist.,* 473 U.S. 1308, 1311-1312, 106 S.Ct. 1, 87 L.Ed.2d 677 (1985) (Rehnquist, J., in chambers). "This is always a difficult and speculative inquiry." *Legalization Assistance Project, supra,* at 1304, 114 S.Ct. 422. Although "a stay application to a Circuit Justice on a matter before a court of appeals is rarely granted," *Heckler,* 473 U.S., at 1312, 106 S.Ct. 1 (internal quotation marks omitted), consideration of the relevant factors leads me to conclude that a stay is appropriate in this case.

To begin with, the equities here support preserving the status quo while the city's appeal proceeds. Compared to the irreparable harm of altering the memorial and removing the cross, the harm in a brief delay pending the Court of Appeals' expedited consideration of the case seems slight. In addition, two further factors make this case "sufficiently unusual," *ibid.,* to warrant granting a stay. First, a recent Act of Congress has deemed the monument a "national memorial honoring veterans of the United States Armed Forces" and has authorized the Secretary of the Interior to take title to the memorial on behalf of the United States if the city offers to donate it. § 116, 118 Stat. 3346. Because this legislation postdates the Court of Appeals' previous decisions in this case, its effect on the litigation has yet to be considered. Second, San Diego voters, seeking to carry out the transfer contemplated by the federal statute, have approved a ballot proposition authorizing donation of the monument to the United States. While the

Superior Court of California for the County of San Diego has invalidated the ballot proposition on the grounds that the proposed transfer would violate the California Constitution, *Paulson v. Abdelnour,* No. GIC-849667 (Oct. 7, 2005), p. 35, the California Court of Appeal for the Fourth Appellate District has issued an order expediting the city's appeal of the Superior Court decision, see *Paulson v. Abdelnour,* No. D047702 (June 20, 2006).

If the state appellate court reverses the Superior Court and allows the memorial to become federal property, its decision may moot the District Court's injunction, which addresses only the legality under state law of the cross' presence on city property, see *Murphy, supra,* at 1438. This parallel state-court litigation, furthermore, may present an opportunity for California courts to address state-law issues pertinent to the District Court's injunction. The state appellate court's decision may provide important guidance regarding those issues and the effect, if any, of the recent federal statute.

Although the Court denied certiorari in this litigation at earlier stages, Congress' evident desire to preserve the memorial makes it substantially more likely that four Justices will agree to review the case in the event the Court of Appeals affirms the District Court's order. The previously unaddressed issues created by the federal statute, moreover, reinforce the equities supporting a stay; and the pendency of state-court litigation that may clarify the state-law basis for the District Court's order further supports

preserving the status quo. Accordingly, although the Court, and individual Circuit Justices, should be most reluctant to disturb interim actions of the Court of Appeals in cases pending before it, the respect due both to Congress and to the parallel state-court proceedings persuades me that the District Court's order in this case should be stayed pending final disposition of the appeal by the United States Court of Appeals for the Ninth Circuit or until further order of this Court. If circumstances change significantly, the parties may apply to this Court for reconsideration.

For these reasons, the application in No. 05A1234 is hereby granted. The proposed intervenor San Diegans for the Mt. Soledad National War Memorial was denied leave to intervene in the District Court and in all events seeks no relief beyond the stay granted in No. 05A1234. Separate consideration of the application in No. 05A1233 thus is unnecessary and this application hereby is denied.

It is so ordered.

Steve **TRUNK** and Philip K. Paulson, Plaintiffs,
v.
**CITY OF SAN DIEGO**, United States of America, Donald H. Rumsfeld, Secretary of Defense and Does 1 through 100, inclusive, Defendants.
Mount Soledad Memorial Association, Real Parties in Interest.

Nos. 06cv1597-LAB (WMc), 06cv1728-LAB (WMc).
United States District Court, S.D. California.

June 4, 2007

**ORDER TO SHOW CAUSE RE: JUSTICIABILITY**

LARRY ALAN BURNS, District Judge.

On September 8, 2006, Plaintiffs Steve Trunk and Philip Paulson filed their First Amended Complaint ("FAC") seeking declaratory and injunctive relief. Specifically, Plaintiffs seek a declaration that transfer of the land which is the subject of this litigation to the federal government violates Plaintiffs' rights under the U.S. and California constitutions, and that the statute authorizing it be declared void *ab initio*. Plaintiffs sought both a preliminary and permanent injunction prohibiting Defendants from displaying the cross on government property. Plaintiffs request the Court "[e]ncourage the parties to honor the settlement agreement that was entered into. . . ." Finally, Plaintiffs seek an award of fees and costs, and any other relief the Court deems just and equitable.

The FAC was subject to a motion to dismiss for lack of jurisdiction, filed October 10, 2006. Amicus

Pacific Justice Institute filed a brief on October 13, 2006 in support of Defendants' motion to dismiss. The Court issued an order on November 7, 2006, noting the amicus brief had raised the issue of Article III standing, and directed the parties to address this issue either in their briefing on the motion to dismiss, or in a subsequent motion. The Court denied the motion to dismiss on November 29, 2006 by minute order following a hearing.

On May 8, 2007, Judge Barry Moskowitz recused and the case was reassigned to Judge Napoleon Jones, who in turn recused on May 15, 2007. The case was then reassigned to Judge Larry Burns. In spite of the reassignment, it is not the Court's intention at this time to revisit the issues briefed and ruled on previously. However, upon reviewing the record, questions present themselves regarding the standing of Plaintiffs Trunk and Paulson, and about the Court's jurisdiction more generally. These Plaintiffs seek, in addition to other remedies, the Court's encouragement of the parties to honor the settlement previously reached between the City of San Diego (the "City") and Plaintiffs Trunk and Paulson; and avoidance of the transfer by invalidation of the federal statute which effected it. While it appears some of these issues have been addressed obliquely, it is not clear at this point that they have been addressed as fully as is required.

Furthermore, it appears that the protracted litigation of related matters has muddied the waters somewhat, and the briefing in this case has not

always identified the relevant issues, legal standards, or authorities. This was noted by the Court previously when it directed the parties to address the issue of Article III standing. To the extent possible, the Court wishes to direct the parties to address the relevant questions and to avoid needless briefing on matters not at issue here.

## I. Legal Standards

Standing is a jurisdictional requirement, and a party invoking federal jurisdiction has the burden of establishing it. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). Standing is a "threshold question in every federal case." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Federal courts are required to examine jurisdictional issues including standing, even *sua sponte* if necessary. *B.C. v. Plumas Unified School Dist*., 192 F.3d 1260, 1264 (9th Cir. 1999).

Even if Plaintiffs Trunk and Paulson have standing under California law, standing sufficient to meet federal standards is a jurisdictional requirement imposed by Article III of the U.S. Constitution and takes priority. *Lee v. American Nat'l Ins. Co.*, 260 F.3d 997, 999 -1000, 1001-02 (9th Cir. 2001). *Accord Wheeler v. Travelers Ins. Co.*, 22 F.3d 534, 537 (3d Cir. 1994) (*citing Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804, 105 S.Ct. 2965, 2970, 86 L.Ed.2d 628 (1985)) (holding that standing to bring an action in

federal court is determined under federal, not state law).

To show they have standing, Plaintiffs must establish three things:

> First [they must have] suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Lujan*, 504 U.S. at 560-61 (citations and internal quotation marks omitted).

## II. Discussion

As Plaintiffs Trunk and Paulson have framed it, their injury consists of the imminent harm they will suffer if the property at issue is taken by the United States and operated as a veterans' memorial with the large cross in place. Their claimed injury does not consist simply of the fact that a large cross is located on particular mountain, nor government ownership or non-ownership of land on Mt. Soledad, nor mere efforts by officials or voters who wished the cross to remain where it was. The parties are directed in their briefing to focus on the elements of an Establishment Clause claim.

### A. Request for Encouragement to Abide by the Settlement Agreement

While courts in the course of making and explaining their rulings do incidentally advise, admonish, exhort, or encourage parties to take various actions, it is unclear why Plaintiffs Trunk and Paulson have standing to seek the issuance of an "encouragement" from the Court as one of their remedies, or why the Court would have jurisdiction to rule on this issue. Such an encouragement would have no force, and could not affect the parties' rights. *See Lewis v. Continental Bank Corp*., 494 U.S. 472, 477 (1990) (holding that federal courts lack the power to decide questions that cannot affect the rights of litigants in the case before them) (citing *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 79 (1978) (requiring a substantial likelihood "that the judicial relief requested will prevent or redress the claimed injury").

### C. Invalidation of the Transfer

The briefing suggests the transfer of the land at issue here was effected by actions taken by both the City, as part of its efforts to "save the Cross" and the United States, in enacting H.R. 5683 as Public Law 190-272. Should the requested relief be granted, ownership of the land would presumably revert to the City.

### 1. Questions Regarding Justiciability

The Court notes several apparent issues bearing on the issues of standing and justiciability generally. First, while the transfer was initially attempted by the City, the transfer at issue here was apparently accomplished entirely by the United States when it enacted Public Law 190-272, which effects a taking of the land. Under the Supremacy Clause, no action taken by the City can invalidate a federal statute. Public Law 109-272 is an act of the United States, not of the City. *Paulson v. City of San Diego*, 475 F.3d 1047, 1049 (9th Cir. 2007) (holding that the passage of Public Law 109-272 was not attributable to the City) (citing *Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 879 (9th Cir. 2006)). It therefore appears the transfer at issue consists only of the taking effected by Public Law 190-272, and the propriety of the City's actions is not justiciable. In addressing the question of standing, the parties are specifically directed to focus on the U.S. government's actions and not the actions of the City or other parties unless such briefing would be relevant or provide needed explanatory background.

In enacting and enforcing its own statutes, the United States is of course not bound by California law, including the California constitution. *Paulson*, 475 F.3d at 1048 ("[T]he United States is not subject to state constitutional authority.") If Plaintiffs Trunk and Paulson have standing to challenge the taking, it will be solely to vindicate their federal rights. Therefore, when the parties address this issue, they should

rely on the United States Constitution and federal law, and need not address the hypothetical issue of whether the U.S. government's taking of the property would have violated California's constitution.

At this stage, Plaintiffs Trunk and Paulson are attempting to challenge the United States' taking of land. What the United States may do with this land is to be addressed in later stages of this action. However, at this point, it is not yet clear why these Plaintiffs have standing to challenge the taking itself, or why such a matter is justiciable at all.

Plaintiffs Trunk and Paulson identify themselves as veterans, and describe their interest as ensuring that the veterans' memorial is operated in a nonsectarian manner. These Plaintiffs have not, however, identified any interest in having the memorial operated by the City rather than by the United States.

It seems clear Plaintiffs Trunk and Paulson would prefer to enforce the previously issued injunction rather than litigate anew against the United States. While efficiency of litigation is a laudable goal and may be the subject of motions within a larger action, *see* Fed. R. Civ. P. 1, the Court is unaware of any authority holding ease or convenience of litigation by itself is a legally protected interest such as could support Article III standing. *See Lujan*, 504 U.S. at 560.

Bearing in mind the injury these Plaintiffs have alleged, the taking puts an end to any California constitutional violation by the City. Obviously, these

Plaintiffs would prefer that the violation was remedied by removing or altering the cross; but, as a matter of law, it appears any means by which the alleged violation is brought to an end will suffice. *Paulson*, 475 F.3d at 1048-49 (Plaintiffs' appeal became moot with the City's divestment of its interest in the memorial) (citation omitted). *See also Palmer v. Thompson*, 403 U.S. 217, 227 (1971) (declining to require city to continue to operate swimming pools after Constitutional problem of operating pools in a racially segregated manner was brought to an end by closing the pools*); Evans v. Abney*, 396 U.S. 435, 447 (1970) (declining to intervene further after Constitutional violation was ended by state's decision to divest itself of park accepted on condition that it be operated in a racially segregated manner). Therefore, it appears Plaintiffs Trunk and Paulson have no legally protected interest in seeing that the memorial is operated by the City and is subject to California law, rather than being taken by the federal government

Assuming the taking is not invalidated, the United States will be required to abide by the same U.S. Constitutional requirements as would the City. Assuming that violations of the California constitution have ended and thus do not require redress, and any federal Constitutional violations are unaffected by the transfer, it is unclear how invalidating the transfer would redress any injury done to Plaintiffs Trunk and Paulson.

### 2. Political Question Doctrine

It does not appear Plaintiffs Trunk and Paulson have argued that the mere taking of land under the assumption that it will be used for a sectarian purpose, or the taking of land with a religious symbol on it amounts to an Establishment Clause violation. If these Plaintiffs do intend to raise this argument, however, the Court directs them to brief it, particularly addressing the jurisdictional issue of the political question doctrine – *i.e.*, whether this Court has the power to interfere with the federal government's Constitutionally-granted power to acquire property either because of an existing condition on the land, or because of the proposed use for which the property was acquired. *See Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) (holding that the political question doctrine goes to the court's "power to entertain the plaintiffs' action").

The Court has three particular concerns in this regard: 1) that Plaintiffs Trunk and Paulson are asking it to invalidate the taking because the property cannot be used as Congress intended when the taking was authorized – in other words, that this was an unwise decision, 2) that prohibiting the political branches from acquiring land on which religious symbols already exist would impermissibly interfere with the power committed to them under the Takings Clause, and 3) that invalidating the taking on the basis of alleged improper motives expresses lack of the respect due to the Executive and Legislative branches. *See Arakaki v. Lingle*, 477 F.3d 1048,

1066-67 (9th Cir. 2007) (outlining bases for application of the political question doctrine) (citations omitted). Should Plaintiffs Trunk and Paulson fail to brief this argument, the Court will consider it abandoned.

## III. Conclusion and Order

Plaintiffs Trunk and Paulson are therefore **ORDERED TO SHOW CAUSE** why their requests for declaratory relief, for "encouragement" to abide by the settlement agreement, and for invalidation of Public Law 190-272 should not be dismissed as non-justiciable. Plaintiffs Trunk and Paulson may do so by filing a joint memorandum of points and authorities, no longer than 15 pages in length, not counting any appended or lodged material, no later than 21 calendar days from the date this Order is entered in the docket. Defendants may, if they wish, file a joint reply memorandum subject to the same length limitations, no later than 35 calendar days from the date this Order is entered in the docket. The amicus Pacific Justice Institute may, if it wishes, file a reply no longer than 5 pages in length within the time permitted for reply. The Court does not require briefing from the other parties; they may, however, join in the other parties' briefing with the consent of those parties.

While, as noted above, it is not the Court's intention to revisit its previous ruling, the Court has a continuing duty to examine its own jurisdiction. Therefore, the parties are admonished that, should

the briefing disclose a basis for reconsidering the Court's previous order denying Defendants' motion to dismiss for lack of jurisdiction, the Court may do so *sua sponte*. Therefore, the parties should include all authority and arguments relevant to jurisdictional issues as previously briefed. The parties are particularly encouraged, however, to focus on the issues raised in this Order. Appended or lodged material should be kept to a minimum, its significance should be explained in the body of the memorandum, and precise citations should be given.

**IT IS SO ORDERED**.

DATED: June 1, 2007

**/s/**
**HONORABLE LARRY ALAN BURNS**
United States District Judge