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10 **UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

11 STEVE TRUNK )  
12 *Plaintiff,* )  
13 vs. )

14 THE UNITED STATES OF )  
15 AMERICA, )  
16 et al., )  
17 *Defendants,* )

18 \_\_\_\_\_ )  
19 JEWISH WAR VETERANS OF THE )  
20 UNITED STATES OF AMERICA, )  
21 INC., )  
22 et al., )  
23 *Plaintiffs,* )

24 vs. )  
25 CHARLES TIMOTHY HAGEL, )  
26 Secretary of Defense, in his )  
27 official capacity, )  
28 *Defendant.* )

Case No.: 06-CV-1597-LAB (WMc)  
(consolidated with 06-CV-1728)

**BRIEF OF AMICI UNITED STATES REPRESENTATIVES RANDY FORBES, DUNCAN HUNTER, ROBERT ADERHOLT, MICHAEL CONAWAY, JEFF DUNCAN, STEPHEN FINCHER, SCOTT GARRETT, LOUIE GOHMERT, VICKY HARTZLER, BILL JOHNSON, WALTER JONES, MIKE KELLY, JAMES LANKFORD, ROBERT LATTA, BILLY LONG, JEFF MILLER, MATT SALMON, AND LYNN WESTMORELAND CONCERNING THE APPROPRIATE REMEDY**

1 Amici, United States Representatives Randy Forbes, Duncan Hunter, Robert Aderholt,  
2 Michael Conaway, Jeff Duncan, Stephen Fincher, Scott Garrett, Louie Gohmert, Vicky Hartzler,  
3 Bill Johnson, Walter Jones, Mike Kelly, James Lankford, Robert Latta, Billy Long, Jeff Miller,  
4 Matt Salmon, and Lynn Westmoreland, are currently serving members of the 113th Congress.  
5 They submit this brief pursuant to the Court’s Minute Order of April 25, 2013.  
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7 Amici strongly disagree with the decision of the United States Court of Appeals for the  
8 Ninth Circuit holding that the federal government’s operation of the Mount Soledad Veterans  
9 Memorial violates the Establishment Clause due to the presence of its commemorative cross. At  
10 this juncture, however, Amici believe that the best course of action, in keeping with the goal of  
11 maintaining the Memorial as a longstanding tribute to our men and women in uniform, is to  
12 allow a private organization to continue to maintain the property as a veterans’ memorial, via a  
13 sale or land transfer. Plaintiffs’ assertion that “[t]he only remedy in this case that would be  
14 consistent with the Ninth Circuit’s opinion is to order the removal of the Cross from its current  
15 position at the center of the Memorial atop Mount Soledad,” Doc. 341, at 5, is incorrect.  
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18 The Supreme Court’s decision in *Salazar v. Buono*, 130 S. Ct. 1803 (2010)—which  
19 Plaintiffs do not address—strongly supports the validity of a land transfer or sale of a public  
20 veterans memorial as a means of addressing Establishment Clause concerns raised in controlling  
21 judicial decisions, while avoiding the unwanted specter of the government destroying or  
22 removing aspects of the memorial. In *Salazar*, the Court reversed a Ninth Circuit decision that  
23 held that a statute authorizing a land exchange between the federal government and the VFW  
24 was unconstitutional. *Id.* at 1811 (Kennedy, J., plurality). The statute—enacted in light of  
25 previous decisions holding that the government’s operation of a World War I memorial  
26 unconstitutionally endorsed religion due to the memorial’s cross—provided that the government  
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1 would transfer the memorial to the VFW on the condition that it continue to be maintained as a  
2 World War I memorial, in exchange for another parcel of land.

3 Justice Kennedy's plurality opinion stated that the lower court decisions regarding the  
4 land transfer had improperly attributed a sectarian religious motive to Congress. The lower  
5 courts' analysis ignored that the injunction resulting from the decision on the merits "presented  
6 the Government with a dilemma. It could not maintain the cross without violating the  
7 injunction, but it could not remove the cross without conveying disrespect for those the cross  
8 was seen as honoring." *Id.* at 1817. The opinion characterized the land transfer as a common-  
9 sense way to address this dilemma, and noted that, in the context of a veterans memorial, "a  
10 Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor  
11 and respect those whose heroic acts, noble contributions, and patient striving help secure an  
12 honored place in history for this Nation and its people." *Id.* at 1820.

13 Justice Alito wrote a concurring opinion in which he emphasized the historical  
14 significance of crosses at veterans' memorials and the secular justification for the land transfer.  
15 *Id.* at 1821-24 (Alito, J., concurring). He explained,

16 If Congress had done nothing, the Government would have been required to take  
17 down the cross, which had stood on Sunrise Rock for nearly 70 years, and this  
18 removal would have been viewed by many as a sign of disrespect for the brave  
19 soldiers whom the cross was meant to honor. The demolition of this venerable if  
20 unsophisticated, monument would also have been interpreted by some as an  
21 arresting symbol of a Government that is not neutral but hostile on matters of  
22 religion and is bent on eliminating from all public places and symbols any trace  
23 of our country's religious heritage.

24 *Id.* at 1822-23 (citation omitted).

25 Other courts have upheld the sale or transfer of public property as a valid remedy in  
26 similar situations. For example, in *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir.  
27 2005), the Seventh Circuit upheld the sale of a portion of a city park that included a Ten  
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1 Commandments monument to the organization that donated the monument to the city. *Id.* at  
2 705-06. The court explained:

3       The City . . . had a rather obvious secular motive for the sale--it wanted to  
4 eliminate its ownership in the Monument to preempt litigation accusing it of  
5 using the Monument to endorse a religious message by displaying it on public  
6 property. The Appellees claim that the reason is not secular because the City  
7 could have avoided the lawsuit by simply removing or allowing someone else to  
8 remove the Monument. They claim that by not removing it and by leaving it on  
9 what had been City property demonstrates that the City's motive was not secular.  
10 . . . [I]n most cases, a government can remedy a potential Establishment Clause  
11 violation by selling the real property where the religious monument sits. While  
12 removal was an option, so also was the sale. By selling the Monument site to end  
13 a perceived endorsement, the City exercised an option that served a secular  
14 purpose. . . .

15       A reasonable person, considering the history of the monument recited above,  
16 would understand the City's desire to keep the Monument in its original location.  
17 . . .

18       In addition to meeting the legal standards of the Establishment Clause, the sale  
19 achieves a practical goal. The City is able to extricate itself completely from the  
20 implied endorsement of the purpose and content of the religious symbol, yet the  
21 Monument can remain in the location it has occupied for many years. If the local  
22 citizens at some point want the symbol moved to make way for an alternate use,  
23 the solution can be found in the political rather than the legal process.

24 *Id.* at 705; *see also Freedom From Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487,  
25 497 (7th Cir. 2000) (holding that a city's sale of parkland that included a statue of Jesus did not  
26 violate the Establishment Clause, and remanding for further proceedings to remedy the inability  
27 to distinguish between the property at issue and nearby public property); *Chambers v. City of*  
28 *Frederick*, 373 F. Supp. 2d 567, 572-73 (D. Md. 2005) (upholding the sale of part of a public  
memorial ground that included a Ten Commandments monument to the monument's donor).<sup>1</sup>

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<sup>1</sup> Decisions that invalidated proposed sales of the Mount Soledad Veterans Memorial in the prior federal litigation involving the City of San Diego are not controlling because they were based on the California Constitution, not the federal Establishment Clause. *See Paulson v. City of San Diego*, 294 F.3d 1124 (9th Cir. 2002) (en banc) (decision based upon Cal. Const. art. XVI, § 5); *Murphy v. Bilbray*, No. 90-134 GT, 1997 U.S. Dist. LEXIS 23707 (S.D. Cal. Sept. 18, 1997) (unpublished) (decision based upon Cal. Const. art. I, § 4 and art. XVI, § 5).

1 A sale or transfer of the Memorial to a private organization would remedy any perceived  
2 governmental endorsement of religion, like the land transfer in *Salazar* and the sale in *Mercier*.  
3 The terms of the acquisition would not dictate what particular items that the organization must  
4 keep, add, or remove from the Memorial as it presently stands, but rather would reflect the  
5 secular purpose of maintaining a veterans' memorial on the property. The Mount Soledad  
6 Memorial Association, which has worked tirelessly to improve and preserve the Memorial for  
7 many years, should be given the first opportunity to acquire and maintain the Memorial.  
8 Plaintiffs' failure to discuss *Salazar*, *Mercier*, or any similar cases while asserting that removal  
9 of the Memorial's cross is the only viable remedy is telling, and their proposed remedy would  
10 convey disrespect for those (of all faiths or none) that the Memorial's cross honors. *See Buono*,  
11 130 S. Ct. at 1817 (Kennedy, J., plurality); *id.* at 1822-23 (Alito, J., concurring).

#### 14 CONCLUSION

15 For the foregoing reasons, Amici respectfully request that the Court enter an order  
16 requiring Defendants to solicit and review offers for the sale or exchange of the Memorial,  
17 which would allow a private organization to continue to maintain the property as a veterans'  
18 memorial.  
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Dated: August 21, 2013

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