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10  
11 UNITED STATES DISTRICT COURT  
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA

13 **THE LIONS CLUB OF ALBANY,**  
14 **CALIFORNIA, A Nonprofit Corporation,**

15 **Plaintiff,**

16 **v.**

17 **THE CITY OF ALBANY, a Charter City; and**  
18 **DOES 1 through 25;**

19 **Defendants.**

Case No. 4-22-CV-5377 WHO

**PLAINTIFF NOTICE OF MOTION AND  
MOTION, AND MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION FOR  
PRELIMINARY INJUNCTION**

**Date: November 2, 2022**

**Time: 2:00 P.M.**

**Courtroom: 2 on the 17<sup>th</sup> Floor**

**Judge: William H. Orrick**

20  
21 **NOTICE OF MOTION**

22 PLEASE TAKE NOTICE that on November 2, 2022 at 2:00 P.M. , at Courtroom 2, on  
23 the 17<sup>th</sup> Floor, before the Honorable William H. Orrick, Plaintiff, The Lions Club of Albany,  
24 California, will and hereby does seek a Preliminary Injunction enjoining Defendant, The City of  
25 Albany, its officers, agents, servants, employees and all persons in concert or participation with  
26 them from taking, removing, deconstructing, demolishing or otherwise injuring or interfering with  
27 the structure known as the Cross on Albany Hill located on the east side of Albany Hill above Taft  
28 Street in the City of Albany.



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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 This action seeks to prevent the City of Albany, California (City) from abusing the power  
4 of eminent domain to remove a Christian Cross originally constructed on private property by the  
5 Lions Club of Albany, California (Lions Club) and now standing on a valid<sup>1</sup> easement in a park  
6 on Albany Hill. The City has obtained an Order from the Superior Court of the State of California  
7 for the County of Alameda authorizing prejudgment possession of the Lions' easement and  
8 allowing the City to tear down and remove the Cross after October 4, 2022<sup>2</sup>.

9 The Lions Club constructed the Cross in 1971 on real property owned by Hubert and Ruth  
10 Call. The property was sold to a developer in 1973 who in turn conveyed it to the City to construct  
11 a park as a condition of obtaining a building permit for a nearby condominium development. Prior  
12 to the Call's sale of the property to the developer, the Calls granted the Lions Club an easement  
13 for ingress, egress and to maintain the Cross. Despite the Cross and easement, the City accepted  
14 the property in 1973, created a park on Albany Hill and allowed the Lions Club to exercise their  
15 easement to light and maintain the Cross. The Cross can be seen by residents in the Albany and  
16 Berkeley communities and is particularly visible when lighted at night.

17 The Lions Club and its members have exercised their religious beliefs by lighting and  
18 displaying the Cross on Albany Hill during the Christmas and Easter season and hosting Easter  
19 morning services for more than fifty years. The Lions also maintain the Cross as an exercise of  
20 religious expression by providing members of the community the opportunity see and visit the  
21 Cross, receive its message, engage in prayer, receive comfort, hope, inspiration, gather in  
22 fellowship and rejoice in God. The Lions display of the Cross is a symbolic communication to the  
23 community conveying God's presence and is comforting to many in the community.

24 In 2015, following a complaint from the "East Bay Atheist" group the City became openly  
25 hostile toward the Cross. On multiple occasions the City Council expressed its desire that the

26 <sup>1</sup> See *Lions Club of Albany v. City of Albany*, 323 F. Supp. 3d 1104, 1111-15 (N.D. Cal.  
27 2018)

28 <sup>2</sup> The City of Albany has graciously agreed to extend the deadline for removal of the  
Cross until November 5, 2022.

1 Cross be removed from Albany Hill. However, the Lions Club refused to relinquish its easement  
2 or to remove the Cross.

3 On September 1, 2016, the City unlawfully disconnected electrical utility services to the  
4 Cross and refused to reinstate the power for 106 days resulting in a law suit pursuant to 42 USC  
5 §§ 1983, 1988. The City counterclaims against the Lions seeking to remove the Cross but those  
6 claims were dismissed on summary judgment. The Court found the Lion's easement valid and  
7 declared in *dicta* that the City must remedy its First Amendment Violation but stated that the Court  
8 could not compel the City to do so because no plaintiff with standing had intervened in the case.  
9 The District Court was sustained by the 9<sup>th</sup> Circuit Court of Appeal. The Lions' claims against the  
10 City were resolved by a \$125,000.00 settlement.

11 Undaunted the City has continued its campaign of dissatisfaction advocating for removal  
12 of the Cross. On April 4, 2022, the City enacted a "Resolution of Necessity" condemning the  
13 Lion's easement and seeking to remove the Cross.

14 On May 4, 2022, to satisfy City Council members and atheists, the City filed an eminent  
15 domain action to condemn the Lions Club's easement to maintain the Cross and remove the Cross.  
16 Two days later the City applied for an Order for Prejudgment Possession to enable the City to  
17 remove the Cross prior to trial. Despite objections of the Lions Club. The Lions Club filed a  
18 verified answer disputing the City's right to take the property under eminent domain and raised  
19 ten affirmative defenses to the action. Despite the disputed nature of the City's action, the Superior  
20 Court issued an Order allowing the City prejudgment possession of the Lions easement and  
21 removal of the Cross staying the removal until after October 4, 2022. (The date has been extended)

22 The City Councilmembers have shown and expressed a clear preference for atheism and  
23 non-Christian religions over the Christian religion and its symbols. The City has repeatedly  
24 expressed its desire to remove the Cross and is now abusing the exercise of eminent domain to  
25 achieve the purpose of removing the Cross without regard to the Lions Club's rights to free  
26 exercise of religion, and free speech under First Amendment of the United States Constitution.

27 The City's predisposition for removal of the Cross made the outcome of the Resolution  
28 of Necessity hearing a foregone conclusion. When a city acts upon an anti-Christian preference

1 when deciding a dispute over First Amendment rights it not only interferes with and negatively  
2 burdens the Free Exercise of Religion and Free Speech in Violation of the First Amendment but  
3 such preference also violates of the Establishment Clause and substantive due process under the  
4 Fourteenth Amendment.

5 The City's stated reason for the exercise of eminent domain is, "elimination of a *potential*  
6 establishment clause violation and to provide for an unencumbered public park." This claim is a  
7 mere pretext for religious discrimination. The Lions Club offered to purchase a small plot of land  
8 upon which the eight-foot wide Cross and its six-foot by four-foot base stand. The sale of such a  
9 small plot of land to a nongovernmental entity would eliminate any potential establishment clause  
10 problem, and have no significant effect on the park. Selling a small plot of land would also  
11 constitute the least restrictive means or furthering any compelling governmental interest in  
12 eliminating a "potential" Establishment Clause problem. However, the City rejected the Lions'  
13 proposal without comment or consideration. The City's longstanding anti-cross statements, and  
14 abuse of authority left no doubt the rejection of the Lions offer was inevitable.

15 The City's bias against the Cross is so significant that it is unwilling to even follow the  
16 requirements of the law. The City has no right to condemn the Cross by eminent domain under  
17 California law. The City failed to consider the required findings by Code of Civil Procedure  
18 §1240.030. There is no necessity for condemnation because the Lions Club offered to resolve  
19 alleged problem at no cost to the City, by offering to buy the lot upon which the Cross stands. This  
20 solves all the City's problems because the Cross would be under private ownership. The City  
21 rejected the Lions Club offer. Having rejected the offer the City cannot now contend there is any  
22 public necessity to condemn the Lions Club's property rights and the Cross.

23 The Cross has stood for over fifty years but the City is suddenly in a hurry to take the  
24 Lions' easement and remove the Cross despite the City's failure to identify any significant harm it  
25 will suffer in waiting for a final determination of the right to take the Lions property. It can take  
26 years between the time a public agency files an eminent domain action and the time it obtains title  
27 to the property via a final order of condemnation. Generally, prejudgment possession has been  
28 limited to those situations where there exists an urgent need to construct a project such as a road,

1 school, or fire station. In such instances an order of prejudgment possession to construct an  
 2 urgently needed project is appropriate. Here the City is constructing nothing. It has no project.  
 3 Furthermore, the City has failed to comply with California Code of Civil Procedure  
 4 §1255.410(d)(2)(C) which requires the City to establish an “overriding need to possess the property  
 5 prior to the issuance of final judgment;” by showing that the Plaintiff [the City] will suffer a  
 6 substantial hardship. Subsection (D) requires the hardship the plaintiff will suffer must outweigh  
 7 any hardship on the defendant that would be caused by the granting of the order of possession.  
 8 Here the City has shown no significant hardship it will suffer while the Lions will suffer the taking  
 9 of the Cross, deprivation of their rights of Free Speech and Free Exercise of Religion which will  
 10 result in irreparable harm. The City however totally ignores the Lions deprivation of Constitutional  
 11 rights as a harm.

12 The City has already taken possession of the Lions easement for the Cross and will  
 13 unnecessarily take, deprive, injure, burden, and harm the Lions rights of free exercise of religion  
 14 and free speech by violating the establishment clause and due process if it is allowed to take down  
 15 and remove the Cross.

## 16 **BACKGROUND**

### 17 ***The Albany Lion’s Easement and the Cross on Albany Hill***

18 In 1971 the Lions Club constructed a Christian Cross on real property owned by Hubert  
 19 and Ruth Call. (Berner Dec. ¶ 3) The property was sold to a developer in 1973 who in turn  
 20 conveyed it to the City to construct a park as a condition of obtaining a building permit for a nearby  
 21 condominium development. Prior to the Call’s sale of the property to the developer, the Calls  
 22 granted the Lions an easement for ingress, egress and to maintain the Cross. Despite the Cross and  
 23 easement, the City accepted the property in 1973, created a park on Albany Hill. (*Lions Club of*  
 24 *Albany* at 1108) The Cross can be seen from many areas in Albany and Berkeley communities and  
 25 is particularly visible when lighted at night. (Pope Dec. ¶ 4)

### 26 ***The Cross and the Exercise of Religion and Free Speech***

27 1. Since its construction the Lions Club has illuminated the Cross prior to each  
 28 Christmas and Easter. The Lions Club has also continued a long-standing community tradition of

1 celebrating Easter Morning services at the Cross. (Berner Dec. ¶¶ 5 and 7) The Lions Club members  
2 find it religiously satisfying when the Cross is seen and appreciated by others in the community on  
3 a daily basis as well as during the holidays. (Pope Dec. ¶ 6 and 7) The Cross is a gathering site for  
4 religious worship for members of the surrounding communities for prayer, worship and other  
5 religious activities. (Pope Dec. ¶¶ 8 and 9). The taking of the Lions' easement has and removal of  
6 the Cross by the City will take, deprive, injure, burden, and harm the Lions free exercise of religion  
7 and free speech both at the Cross and by the symbolic sharing of Christian ideas through the year-  
8 round display of the Cross. (Berner Dec ¶ 12)

### 9 ***The City's Hostility to the Cross***

10 The City became hostile to the Cross in 2015, when the East Bay Atheists began criticizing  
11 the symbol. (*Lions Club of Albany* at 1110)

12 On February 1, 2016, the Albany City Council conducted a public hearing concerning the  
13 "Lions' cross." The council unanimous expressed their desire that the Lions cross be removed from  
14 Albany Hill. (Nichols Dec. ¶ 3) Preston Jordon, a member of the public at the time and who is now  
15 serving on the Council stated, "I just want to add my voice of support to all the good thinking that  
16 you've heard already for removing the cross. I know it's a very difficult thing to get accomplished,  
17 and I commend you for pursuing it in the most cost-efficient manner possible. But please pursue  
18 it." (Nichols Dec. ¶ 4)

19 On February 4, 2016 Councilmember Nason attended a meeting of the Lions Club and  
20 expressed the City's dissatisfaction with the cross because it is a religious symbol. Nason stated the  
21 City wished the cross removed from Albany Hill and the Lions Club's easement relinquished to the  
22 City. (Nichols Dec. ¶ 5) The Lions Club refused to relinquish its easement or to remove the Cross.

23 On September 1, 2016, the City caused electrical utility service to the Cross to be  
24 disconnected for 106 days. The Lions brought a law suit in the U.S. District Court for the Northern  
25 District of California for damages resulting from the City's utility disconnection action. The City  
26 counterclaimed in an effort to invalidate the Lions' easement and remove the Cross. (*Lions Club of*  
27 *Albany* at 1110) The District Court granted summary judgment against the City as to the Quiet Title,  
28 Trespassing and Nuisance causes of action. The Court found the Lion's easement valid and declared

1 in *dicta* that the City must remedy its First Amendment Violation but the Court could not compel  
2 the City to do so because no plaintiff with standing had intervened in the case. (Id at 1111 and 1117-  
3 1118)

4 On November 18, 2016, Councilmember Nason issued a public statement saying, “[T]he  
5 Albany City Council (including me) would like to replace it [the cross] with something  
6 nonsectarian. We envision a site that could still be used for Easter services and other Christian and  
7 non-religious purposes.” (Nichols Dec ¶ 6)

8 In a Declaration filed with the U.S. District Court in the matter *Lions Club of Albany v. City*  
9 *of Albany*, Councilmember Nason wrote: “When, as a member of the City Council in 2014, I learned  
10 that atheist groups were asking that the cross be removed, I was supportive of their efforts and  
11 assumed that this would be an uncomplicated matter.” (Nichols Dec ¶ 7)

12 In a November 11, 2017 “Mayor’s Statement” then Mayor Peggy McQuaid stated, “The  
13 Albany City Council was dismayed to learn that in a departure from historical practice, the cross  
14 on Albany Hill was lit by the Albany Lions Club on Friday, November 10. I am sure many Albany  
15 residents recognized Veterans Day in a manner which was appropriate and meaningful for them. I  
16 want to reiterate that the neither City Council nor the City of Albany endorses in any way the  
17 lighting of the cross for any occasion, religious or nationalistic, or supports its continued presence  
18 on public property.” (Nichols Dec ¶ 8)

19 At the April 6, 2020, meeting of the Albany City Council, Preston Jordon again speaking  
20 as a private citizen prior to his election to the City Council asked if a sign could be erected in  
21 front of the Cross legally -- a sign that is of sufficient size that the cross cannot be seen from most  
22 of the community? A second councilmember suggest fast growing trees. The two wondered  
23 “could we basically block the view of the cross?” (Nichols Dec ¶ 9)

24 The City’s actions and statements show its expressed hostility preferring the positions  
25 preferring atheists and non-Christians without regard to the Lions Club’s rights to religious  
26 expression and free speech.

27 ***The Resolution of Necessity and Eminent Domain***

28 Having failed to force removal of the Cross by disconnecting the utility services or by

1 lawsuit the City next turns to eminent domain as a means of achieving its expressed goal of  
 2 removing the Cross from Albany Hill. On April 4, 2020, the Albany City Council conducted a  
 3 public hearing on a proposed “Resolution of Necessity” to condemn the Lions easement and remove  
 4 the Cross. The resolution, written in conclusionary terms, states that the taking is necessary “in  
 5 order for the elimination of a potential establishment clause violation and to provide an  
 6 unencumbered public park in the City of Albany. . .” (Nichols Dec. Exhibit 2 p1)

7 The Lions offered to purchase the plot of land upon which the Cross is located thereby  
 8 eliminating any “potential” establishment clause problem by allowing the property to proceed into  
 9 private, nongovernmental hands. The City Attorney acknowledged the Lions offer constituted an  
 10 alternative to eminent domain that the City could consider; it did not. Prior to the hearing the Lions  
 11 forwarded a letter to the City asserted that the City was showing a religious prejudice against  
 12 Christians and was prejudicially favoring atheism and non-Christian religions. The letter further  
 13 illustrates the City’s prejudicial treatment of this matter explaining that the Resolution and property  
 14 appraisal were fatally flawed under eminent domain law. Following further comments from the  
 15 Lions representatives and citizens comments opposing the Cross, the City Council adopted by  
 16 unanimous vote the Resolution of Necessity without any questions, comments or discussion by the  
 17 Councilmembers. (Berner Dec. ¶ 12 and and Nichols Dec. Exhibit 2)

18 The City subsequently filed an eminent domain action seeking removal of the Cross along  
 19 with a motion for prejudgment possession. (Nichols Dec. Exhibits 3 and 4) The Lions Club filed a  
 20 Verified Answer asserting Ten Affirmative Defenses. (Nichols Dec. Exhibit 5) The Lions also filed  
 21 a Memorandum of Points and Authorities in Opposition to the Motion. (Nichols Dec. Exhibit 6)  
 22 Without regard to the Lions First Amendment rights of free speech and free exercise of religion,  
 23 the Superior Court granted the City’s motion which will permit the City to remove the Cross after  
 24 October 4, 2020 (now extended to November 5, 2022). (Nichols Dec. Exhibit 7)

### 25 LEGAL STANDARD

26 To obtain a preliminary injunction, a plaintiff must show: (1) that it is “likely to succeed  
 27 on the merits,” (2) that it is “likely to suffer irreparable harm in the absence of preliminary relief,”  
 28 (3) that the “balance of equities tips in [its] favor,” and (4) that “an injunction is in the public

1 interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249  
 2 (2008). When the government is a party, the last two factors merge. *California v. Azar*, 911 F.3d  
 3 558,575 (9th Cir. 2018); *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

## 4 ARGUMENT

### 5 I. The Lions Club is Likely to Succeed on the Merits

#### 6 A. The City’s Action Taking Property and Removing a Christian Cross Interferes 7 with and Burdens the Lions Club’s Free Exercise of Religion

8 The First Amendment’s Free Exercise Clause bars government from “prohibiting the free  
 9 exercise” of religion. (U.S. Constitution, Amendment I.) The "exercise of religion" often involves  
 10 not only belief and profession but the performance of (or abstention from) physical acts such  
 11 as assembling with others for a worship service, participating in sacramental use of bread and  
 12 wine, proselytizing, abstaining from certain foods or certain modes of transportation. A State would  
 13 be prohibiting the free exercise of religion if it sought to ban such acts or abstentions only when  
 14 they are engaged in for religious reasons, or only because of the religious belief that they  
 15 display. *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). The City of Albany has engaged in  
 16 just such a violation.

17 A plaintiff may carry the burden of proving a Free Exercise violation in various ways,  
 18 including by showing that a government entity has burdened his sincere religious practice pursuant  
 19 to a policy that is not “neutral” or “generally applicable.” *Kennedy v. Bremerton Sch. Dist.*, No.  
 20 21-418, 2022 WL 2295034, (U.S. June 27, 2022) (quoting *Emp. Div., Dep’t of Hum. Res. of Ore.*  
 21 *v. Smith*, 494 U.S. 872, 881 (1990)); *Fellowship of Christian Athletes v. San Jose Unified Sch.*  
 22 *Dist. Bd. of Educ.*, No. 22-15827 (9th Cir. Aug. 29, 2022) When a plaintiff makes such a showing,  
 23 a court “will find a First Amendment violation unless the government can satisfy ‘strict scrutiny’  
 24 by demonstrating its course was justified by a compelling state interest and was narrowly tailored  
 25 in pursuit of that interest.” *Kennedy* at 17; see also *Tandon v. Newsom*, 141 S. Ct. 1294,1296; 209  
 26 L. Ed. 2d 355 (2021) (*per curiam*) (“[T]he government has the burden to establish that [a]  
 27 challenged law satisfies strict scrutiny.”)

28 In the present case the City of Albany has taken the Lions Club’s easement and will remove

1 the Cross which the Lions constructed on Albany Hill by eminent domain. The Lions Club has  
2 filed a Verified Answer with Ten Affirmative Defenses disputing the City's right to take under  
3 eminent domain. Specifically, the City has targeted the Cross for removal repeatedly expressing  
4 its dislike for the worldwide symbol of Christianity and its desire to remove the Cross. The City  
5 has refused to consider or adopt any alternative that would leave the Cross in place. The burden  
6 imposed on the Lions' by removal of the Cross will result in the termination of the traditional  
7 religious practices of lighting the Cross at Christmas and Easter; holding Easter Morning services  
8 at the Cross, a 50 year tradition; providing Lions and the community a site where persons may  
9 gather, worship and pray; and communicating the symbol of the Cross and all of its meaning to  
10 the community. Once removed the traditional religious expressions will be lost and efforts to  
11 subsequently return and restore those traditional practices will likely be lost forever.

12 **1. The Taking of the Lions Easement and Removal of the Cross is Subject**  
13 **to Strict Scrutiny Since it is Neither Neutral or Generally Applicable**

14 Strict scrutiny applies to the City's taking of the Lions Club's easement and removal of the  
15 Cross for two independent reasons.

16 First, the Free Exercise Clause, like the Establishment Clause, forbids subtle departures  
17 from neutrality, and covert suppression of particular religious beliefs. Official action that targets  
18 religious conduct for distinctive treatment cannot be shielded by mere compliance with facial  
19 neutrality. The Free Exercise Clause protects against governmental hostility which is masked as  
20 well as overt. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534; 113  
21 S. Ct. 2217 (1993). Courts apply strict scrutiny when the government "proceeds in a manner  
22 intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City*  
23 *of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). Court must survey meticulously the circumstances  
24 of governmental categories to eliminate, as it were, religious gerrymanders. *Lukumi* at 534.  
25 Relevant evidence includes, among other things, the historical background of the decision under  
26 challenge, the specific series of events leading to the enactment or official policy in question, and  
27 the legislative or administrative history, including contemporaneous statements made by members  
28 of the decision-making body. *Id* at 540.

1 In the instant case the City has a long history of animus toward the Cross. In 2016, the  
2 City Council unanimously expressed the desire that the Cross be removed, because the cross is a  
3 religious symbol. The city council members stated it wanted the Cross removed and the Lions’  
4 easement relinquished to the City.

5 On September 1, 2016, the City attempted to force removal of the Cross by instructing  
6 PG&E to disconnect electrical utility service thereby shutting down power for 106 days. When  
7 the Lions Club sued the City again attempted to force removal of the Cross by counterclaiming  
8 for Quiet title Nuisance and trespass. On summary judgment Court found the Lions’ easement  
9 valid but granted summary judgment against the City on its counterclaims. This ruling was  
10 sustained on appeal.

11 City Councilmembers have repeatedly expressed anti-Cross sympathies with statements  
12 such as the following:

- 13 • “The Albany City Council (including me) would like to replace it [the Cross]  
14 with something nonsectarian. We envision a site that could still be used for  
15 Easter services and other Christian and non-religious purposes.”
- 16 • I want to reiterate that the neither City Council nor the City of Albany endorses  
17 in any way the lighting of the cross for any occasion, religious or nationalistic,  
18 or supports its continued presence on public property.”
- 19 • “Could a sign be erected in front of the cross legally, a sign that is of sufficient  
20 size that the cross cannot be seen from most of the community/” Fast growing  
21 trees?

22 In a Declaration filed with the U.S. District Court Councilmember Nason stated:

- 23 • “When, as a member of the City Council in 2014, I learned that atheist groups  
24 were asking that the cross be removed, I was supportive of their efforts and  
25 assumed that this would be an uncomplicated matter.”

26 The City’s anti-Christian Cross bias was plainly apparent at the meeting of April 4, 2022,  
27 when the Council considered the Resolution of Necessity in anticipation of the eminent domain  
28 action. The resolution of necessity was fatally flawed because it failed to specifically identify a

1 “project.” California law only permits the exercise of eminent domain if the “project” meets three  
2 prerequisite requirements. The failure to identify a “project” makes the required findings that the  
3 project was in the public interest, necessarily required for the project, compatible with the greatest  
4 public good and least private injury, impossible. See Cal. Code of Civ. Pro. §1240.030.  
5 Furthermore, the Resolution states no facts justifying the conclusions but merely contains a series  
6 of unsubstantiated conclusionary statements.

7 The Lions Club has repeatedly offered to purchase the plot of land with the Cross, thereby  
8 obviating any perceived need to remove the Cross. However, the Council refused to even consider  
9 this secular option. Instead, the City Council adopted by unanimous vote without comment or  
10 discussion by the council the resolution or necessity. Furthermore, the lack of any facts and reliance  
11 on conclusionary statements establishes further shows arbitrary and capricious nature of the council  
12 action.

13 *Second*, California’s eminent domain statute is not a law of “general applicability.” Strict  
14 scrutiny is triggered when the government has in place a system of individual exemptions, it may  
15 not refuse to extend that system to cases of religious hardship without compelling reason.  
16 *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990) [citing *Bowen v. Roy*, 476 U.S. 693, 708  
17 (1986)]. The exercise of eminent domain constitutes a system of individual exemptions requiring  
18 strict scrutiny. *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d  
19 1203 1223 (C.D. Cal. 2002).

20 In exercising the power of eminent domain, the “governing board” [City] had discretion to  
21 adjust its plan in response to public comments, consider alternatives to the proposed action and  
22 exercise its discretion in determining whether the “project” [removal of the Cross] was “compatible  
23 with the greatest public good and the least private injury.” Cal. Code of Civ. Pro. § 1240.030. The  
24 City could have agreed to sell a small plot of land containing the Cross to a private party. The City  
25 instead condemned the Cross with full knowledge that it is a symbol used by the Lions in their  
26 exercise of free speech and free exercise of religion. The City was specifically warned that in  
27 making such a determination it was expressing a preference for atheist and non-Christian religions.  
28 Such individualized decisions are just the sort of government actions that demand strict scrutiny.

1 See *Fulton*, 141 S. Ct. at 1879, and generally *Peterson v. Minidoka County School District No.331*,  
2 118 F. 3d 1351(1997).

3 **2. Defendant’s Actions Fail Both Prongs of Strict Scrutiny.**

4 The City’s exercise of eminent domain against the Lions easement and Cross is a clear  
5 violation of the Lions free exercise of religion which is neither neutral or generally applicable.  
6 Since the City’s action fails both prongs of strict scrutiny the City’s eminent domain action can  
7 stand only if it advances compelling state interests “of the highest order” that is “narrowly tailored  
8 in pursuit of those interests. *Lukumi*, 508 U.S. at 546.

9 **a. Condemning the Property Furthers No Compelling Interest.**

10 Governmental removal of religious symbols is not a compelling state interest. A  
11 government that roams the land, tearing down monuments with religious symbolism and scrubbing  
12 away any reference to the divine will strike many as aggressively hostile to religion. *American*  
13 *Legion v. Am. Humanist Ass'n* 139 S. Ct. 2067, 2085, 204 L. Ed. 2d 452 (2019).

14 Ostensibly, the City claims the compelling interest justifying its taking of the Lions Club  
15 easement and removing the Cross is to “avoid a potential Establishment Clause issue.” The City  
16 implies that it is required to condemn the Lions easement pursuant to the decision in *Lions Club*  
17 *of Albany v. City of Albany*. This belief is patently untrue. Neither the City nor the Lions Club  
18 offered evidence or litigated potential solutions in 2018. In *dicta* the District Court suggested  
19 potential solutions. The District Court offered the City at least two options to address the  
20 Establishment Clause issue, “sell a parcel containing the cross to a private party or condemn the  
21 easement. . .” *Lions Club of Albany v. City of Albany*, 323 F. Supp. 3d 11041117 (N.D. Cal. 2018)  
22 The District Court did not compel the City to take any action regarding the Establishment Clause  
23 issue. *Id* at 1117. The District Court also advised that “the specifics of any remedial plan could be  
24 vetted to avoid yet further constitutional problems. *Id* at 1117. Failing to heed this warning, the  
25 City, with its long history of bias and animosity toward the Cross, has simply chosen the option to  
26 remove the Cross and has run full speed into another constitutional problem.

27 It is important to note that the City caused the perceived Establishment Clause issue by  
28 accepting the property with an easement to maintain the Cross. The District Court found the City

1 responsible for the Establishment Clause problem. *Id.* at 1117. Without fairly weighing alternatives  
2 the City has merely acted on its prejudices and opted for removal of the Cross. Since there exist  
3 an alternative that will not injure the Lions First Amendment rights the City is required to adopt  
4 the most carefully tailored and neutral option. While the City might prefer removal of the Cross,  
5 the government may (and sometimes must) accommodate religious practices and that it may do so  
6 without violating the Establishment Clause. *Hobbie v. Unemployment Appeals Commission*, 480  
7 U.S. 136, 145 (1987). Despite its disapproval the City need not remove the Cross to eliminate its  
8 perceived Establishment Clause problem. The City may simply sell off a subdivided parcel of land  
9 containing the Cross to a private party.

10 The City also attempts to justify its exercise of eminent domain as necessary to “enable the  
11 public to more fully use and enjoy the park as an open space without the encumbrance.” The Cross  
12 is hardly a significant encumbrance standing 28 feet high and 8 feet in width resting upon a  
13 concrete base measuring six feet by four feet. Including the cross arms, the Cross occupies a  
14 miniscule 48 square feet in a five-acre park! The Cross rests on the east side of the park very near  
15 to the edge of a steep slope. The Cross stands away from the trail and does not impede pedestrian  
16 walking traffic through the park or interfere with wildlife. (Pope Dec. ¶ 11) (Berner Dec. 9 and 10)

17 In its application the City touts the natural wildlife in the park and speaks of future plans  
18 for hiking trails and restoring native habitat in general but it fails to explain how the Cross hinders  
19 or interferes with any of these objectives.

20 In sum, the City’s Establishment Clause and “park management” claims are negligible  
21 and fall far short of the justification necessary to withstand substantial scrutiny.

22 **b. The City Has Demonstrated No Compelling State Interest for  
23 Prejudgment Possession and Removal of the Cross.**

24 The City is seeking to remove the Cross NOW, prior to trial. The City offers only the most  
25 meager explanation for immediate removal of the Cross repeating the same potential Establishment  
26 Clause claims discussed above. The City also added an additional justification claiming it is  
27 seeking to “eliminate potential tax payer dollars to be spent regarding a potential Establishment  
28 Clause violation.” The assertion that the City may be sued is speculative. The City has offered no  
evidence of a claim or threatened action regarding the Cross. Furthermore, the City can completely

1 eliminate any such risk by selling the plot containing the Cross to a private party.

2 Most importantly, the City acts as if the Lions loss of their First Amendment rights are  
 3 unimportant and may be totally ignored. Rather the City seems to believe so long as it is willing  
 4 to pay the amount the City has determined is a fair price<sup>3</sup> for the easement and removal of the  
 5 Cross no other rights matter. In light of the City's history of animosity toward the Cross the  
 6 Defendant's actions are nothing more than a litigation tactic to obtain an advantage and an attempt  
 7 to force the Lions to capitulate.

8 **c. Defendant's Actions Are Not Narrowly Tailored**

9 The government may justify an inroad on religious liberty by showing that it is the least  
 10 restrictive means of achieving some compelling state interest. Only those interests of the highest  
 11 order can overbalance legitimate claims to the free exercise of religion. *Thomas v. Review Bd. of*  
 12 *the Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981) When the government "can achieve its interests  
 13 in a manner that does not burden religion, it must do so." *Fulton*, 141 S. Ct. at 1881. In the present  
 14 case the City has at least one option which does not burden the Lions rights of free exercise of  
 15 religion and free speech; allow the property to go into private hands. The Lions have offered to  
 16 purchase the plot upon which the Cross rests but the City has refused to consider this option. Since  
 17 an option not violative of the Lions free exercise and free speech rights is possible, the City's  
 18 proposed taking is not narrowly tailored and will not survive strict scrutiny.

19 **B. Defendant's Taking Possession of the Lions Easement Violates the**  
 20 **Equal Protection Clause.**

21 The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated  
 22 persons be treated alike, without distinctions based on immutable characteristics. *City of Cleburne*  
 23 *v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The due process clause includes a substantive  
 24 component which guards against arbitrary and capricious government action, even when the  
 25 decision to take that action is made through procedures that are in themselves constitutionally  
 26 adequate. *Halverson v. Skagit County*, 42 F.3d 1257 (9th Cir. 1994) (quoting *Sinaloa Lake*, 882

27 <sup>3</sup> The Lions Club strongly disagrees and disputes the valuation by the City's appraiser of  
 28 the value of the easement under the law should taking be of the Lions property be permitted.

1 F.2d at 1407.) In this matter the City of Albany is preferring Atheism, non-Christian religions and  
 2 the removal of Christian symbols over the Lions' rights to free speech and religious expression.

3 The statements and actions of the City showing bias and capricious and arbitrary action by  
 4 the City have been set out at length above. The Equal Protection Clause forbids such  
 5 discrimination.

6 In conclusion, the Lions Club is likely to succeed on the merits of its Free Exercise of  
 7 Religion, Free Speech and Equal Protections claim because under a strict scrutiny standard, the  
 8 City cannot establish a compelling governmental interest that is narrowly tailored to prevent a  
 9 substantial burden to the Plaintiff's rights.

10 **II. The Lions Club Will Suffer Irreparable Harm Unless this Court Intervenes and**  
 11 **Halts the Defendant's Removal of the Cross**

12 Unless enjoined by this Court, the Lions Club will suffer irreparable harm if the City is  
 13 permitted to remove the Cross from Albany Hill.

14 First, "[t]he loss of First Amendment freedoms, for even minimal periods of time,  
 15 unquestionably constitutes irreparable injury." *Roman Catholic Diocese of Brooklyn v. Cuomo*,  
 16 141 S. Ct. 63, 67 (2020) (per curiam) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)  
 17 (plurality)). "When an alleged deprivation of a constitutional right is involved, most courts hold  
 18 that no further showing of irreparable injury is necessary." *Hartford Courant Co. v. Carroll*, 986  
 19 F.3d 211, 224 (2d Cir. 2021) (quoting *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984)). See  
 20 also *Thomas More Law Ctr. v. Harris*, No. CV 15-3048-R (C.D. Cal. Nov. 16, 2016); *KTSP-Taft*  
 21 *Television & Radio Co. v. Arizona State Lottery Commission*, 646 F. Supp. 300, 313, (D. Ariz.  
 22 1986); A preliminary injunction is a provisional remedy, the purpose of which is to preserve status  
 23 quo and to prevent irreparable loss of rights prior to final disposition of the litigation. *Napa Valley*  
 24 *Publishing Co. v. City of Calistoga*, 225 F. Supp. 2d 1176, 1180 (N.D. Cal. 2002) The City of  
 25 Albany's eminent domain proceedings are inflicting such harm, irreparably depriving Lions Club  
 26 of its free exercise of religion and free speech.

27 *Second*, even the temporary removal of the Cross will result in irreparable harm. The City  
 28 has presented no evidence even tending to show that once removed that the Cross could be

1 reconstructed or reassembled at the site. While the center beam of the Cross is made of steel, the  
2 arms are much more fragile made of thinner metal. The cross contains electrical fluorescent  
3 lighting mechanisms and fluorescent tubes which provide for the lighting of the Cross. The  
4 lighting mechanisms are covered by plexiglas. Experience has shown the lighting mechanisms are  
5 easily damaged and difficult to repair. (Pope Dec. ¶¶ 13,14) The City has provided no assurance  
6 that it will incur the costs of prompt reconstruction.

7         Displaying a “heads I win, tails you lose attitude,” the City has failed and refused to provide  
8 any assurances that in the exercise of its zoning and building authority would permit and pay for  
9 the reconstruction of the Cross. The City does not acknowledge nor has it agreed that the Cross  
10 could be reconstructed without application of current zoning requirements, plan review, and  
11 construction and building code requirements.

12         Additionally, some members of the Lions Club along with some members of the  
13 community believe the removal of the Cross is a desecration of the sacred symbol. The spiritual  
14 enjoyment they receive will be forever tarnished by such an act. (Pope Dec. ¶12)

15         Furthermore, even temporary removal of the Cross will result in harm to the long-  
16 established religious traditions associated with the Cross. Sunday Easter services at the Cross will  
17 cease and those who have regularly attended will go elsewhere to worship. When such traditions  
18 are interrupted, they are seldom reinstated with the same enthusiasm and fervor. (Berner Dec. ¶ 16  
19 and 17)

20         In view of the forgoing the Lions Club will suffer irreparable harm from the removal of the  
21 Cross.

22         **III. The Balance of Equities and the Public Interest. Favor Protecting the Lions Club’s**  
23         **First Amendment Rights.**

24         In this matter the public interest favors a temporary restraining order and preliminary  
25 injunction. “Courts considering requests for preliminary injunctions have consistently recognized  
26 the significant public interest in upholding First Amendment principles.” *Sammartano v. First*  
27 *Judicial District Court*, 303 F.3d 959, 974 (9th Cir. 2002) Indeed, “[i]t is always in the public  
28 interest to prevent the violation of a party’s constitutional rights.” *Melendres v. Arpaio*, 695 F.3d



**CERTIFICATE OF SERVICE**

I AM A RESIDENT OF THE State of California, over the age of eighteen years and not a party to the within action. My business is 713 Key Route Blvd., Albany, California. I served the following documents:

- **PLAINTIFF’S NOTICE OF MOTION, MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PRELIMINARY INJUNCTION.**
- **DECLARATION OF KENNETH BERNER IN SUPPORT OF PRELIMINARY INJUNCTION.**
- **DECLARATION OF KEVIN POPE IN SUPPORT OF PRELIMINARY INJUNCTION.**
- **DECLARATION OF ROBERT E. NICHOLS IN SUPPORT OF PRELIMINARY INJUNCTION.**
- **[PROPOSED] ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION.**
- **COMPLAINT ON FILE IN THIS ACTION**

by U.S. Mail addressed as follows:

SCOTT W. DITFURTH, ESQ.  
Best Best & Krieger LLP  
P.O. Box 1028  
Riverside, California 92502

and by electronically transmitting (emailing) an electronic copy of each document to:

[scott.ditfurth@bbklaw.com](mailto:scott.ditfurth@bbklaw.com)

I declare under the penalty of perjury under the laws of the State of California and the laws of the United States that the above is true and correct and that this declaration was executed on September 23, 2022, at Albany, California.

/S/ Robert E. Nichols

\_\_\_\_\_  
Robert E. Nichols