

1 SCOTT W. DITFURTH, Bar No. 238127  
scott.ditfurth@bbklaw.com  
2 ANDREW G. SAGHIAN, Bar No. 316680  
andrew.saghian@bbklaw.com  
3 BEST BEST & KRIEGER LLP  
3390 University Avenue, 5th Floor  
4 P.O. Box 1028  
Riverside, California 92502  
5 Telephone: (951) 686-1450  
Facsimile: (951) 686-3083  
6

7 Attorneys for Defendant  
CITY OF ALBANY, a Charter City

8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA

11 THE LIONS CLUB OF ALBANY,  
CALIFORNIA, A Nonprofit Corporation,

12 Plaintiff,

13 v.

14 THE CITY OF ALBANY, a Charter City; and  
15 DOES 1 through 25,

16 Defendants.

Case No. 3:22-cv-05377-WHO

**DEFENDANT CITY OF ALBANY'S  
OPPOSITION TO PLAINTIFF'S  
MOTION FOR PRELIMINARY  
INJUNCTION**

*[Filed concurrently with*

- 1. Request for Judicial Notice; and*
- 2. Declaration of Scott W. Ditfurth]*

Date: November 2, 2022  
Time: 2:00 p.m.  
Courtroom: 2 , 17th Floor  
Judge: Hon. William H. Orrick  
Trial Date: None Set

BEST BEST & KRIEGER LLP  
ATTORNEYS AT LAW  
3390 UNIVERSITY AVENUE, 5TH FLOOR  
RIVERSIDE, CALIFORNIA 92502

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 ATTORNEYS AT LAW  
 3390 UNIVERSITY AVENUE, 5TH FLOOR  
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1 **I. INTRODUCTION**

2 The Lions Club of Albany, California (“Plaintiff”) filed the instant lawsuit only after it  
 3 suffered a procedural setback in the underlying eminent domain action that the City of Albany (the  
 4 “City”) filed. Rather than pursuing the very claims being asserted here in the eminent domain  
 5 action through trial, Plaintiff is asking this Court to serve as a *de facto* court of appeal to review the  
 6 Alameda County Superior Court’s order granting the City prejudgment possession of Plaintiff’s  
 7 easement interest in Albany Hill Park, which the City owns and whereupon an electrically  
 8 illuminated cross stands. The state court’s order further permits the City to remove this cross and  
 9 to preserve it in a safe location pending trial and a final judgment in the lawsuit. Dissatisfied with  
 10 the state court’s ruling, Plaintiff is now seeking damages and injunctive relief in this lawsuit based  
 11 upon the same set of facts and circumstances, not to mention identical legal positions, in the City’s  
 12 underlying eminent domain action.

13 To be clear, the state court has yet to definitively decide whether the Constitutional grounds  
 14 that Plaintiff is using to challenge the City’s eminent domain lawsuit, which also form the basis for  
 15 this federal lawsuit, are valid, thereby defeating the City’s right to condemn Plaintiff’s easement  
 16 interest. The state court merely granted the City *prejudgment* possession, finding that (1) the City  
 17 is entitled to acquire the property by eminent domain, (2) the City deposited \$500,000 in the State  
 18 of California Condemnation Deposits Fund for withdrawal by Plaintiff as probable just  
 19 compensation for the easement, (3) the City has an overriding need to possess the easement before  
 20 final judgment is entered, and that it would suffer a substantial hardship otherwise, and (4) the  
 21 hardship that the City would suffer if possession is denied outweighs Plaintiff’s hardship.

22 As explained in more detail below, Plaintiff cannot demonstrate the likelihood of success  
 23 on the merits in this action for two different reasons. First, federal abstention is warranted under  
 24 either the *Pullman* or the *Colorado River* doctrines.<sup>1</sup> It is appropriate for this Court to abstain from  
 25 exercising its jurisdiction over the claims raised in this lawsuit because: (1) pursuant to the *Pullman*  
 26

27 <sup>1</sup> The City intends, at a later time, to move the Court for an order staying this lawsuit pursuant to  
 28 Federal Rules of Civil Procedure, Rule 7(b). The City also intends to move the Court for an order  
 dismissing this lawsuit for failure to state a claim pursuant to Federal Rules of Civil Procedure,  
 Rule 12(b)(6).

1 doctrine, they may be mooted, or at least presented in a different posture, by a state court decision  
 2 on sensitive issues of California law; and, alternatively, (2) pursuant to the *Colorado River* doctrine,  
 3 there is a pending state court action arising out of the same controversy, and considerations of  
 4 conservation of judicial resources and comprehensive disposition of litigation weigh in favor of  
 5 abstention. The timing of this action coupled with the similar claims, arguments, and positions that  
 6 Plaintiff is asserting in the state court eminent domain lawsuit suggests not just forum shopping,  
 7 but also attempting another bite at the proverbial apple.

8 Second, as the state court found, unencumbering a public park from Plaintiff's easement is  
 9 a legitimate reason to exercise the power of eminent domain and, in doing so, the City is not  
 10 depriving Plaintiff's right to exercise religion freely.

11 Additionally, Plaintiff cannot demonstrate that it would suffer irreparable harm, nor is it  
 12 clear whether Plaintiff has standing to assert these claims against the City. Accordingly, the City  
 13 respectfully requests the Court to deny Plaintiff's Motion for Preliminary Injunction.

## 14 **II. FACTUAL AND PROCEDURAL BACKGROUND**

### 15 **A. The City Owns And Operates Albany Hill Park, Which Plaintiff's Easement** 16 **Currently Encumbers**

17 Plaintiff is a public service organization that Lions Clubs International chartered.  
 18 (Complaint, ¶ 2.) Plaintiff is seeking damages and injunctive relief for the alleged acts the City  
 19 committed under color of state law to deprive and interfere with its free speech and free exercise  
 20 of religion rights and violation of the Establishment Clause. (Complaint, ¶ 4.) Plaintiff's claims  
 21 are being asserted against the City pursuant to United States Code sections 1983 and 1988. (*Id.*)

22 The relationship between Plaintiff, the City, and Albany Hill Park goes back decades, as do  
 23 the many lawsuits involving them. In 1971, Plaintiff constructed a steel and Plexiglas cross on the  
 24 real property that one of Plaintiff's former members owned. (Complaint, ¶ 6.) This property  
 25 eventually became known as Albany Hill Park, and the cross has been located there ever since.  
 26 (Complaint, ¶ 6.) The cross measures approximately 28 feet in height and 8 feet in width, and it  
 27 sits atop a six-by-four-foot concrete base. (Complaint, ¶ 6.) The cross is illuminated during the  
 28 Christmas and Easter holidays. (Complaint, ¶ 9.) Because of its size and location atop Albany Hill

1 Park, many areas in the City and nearby Berkeley communities are able to view the cross on most  
2 days. (Complaint, ¶ 6.)

3 At 338 feet above sea level, Albany Hill is the City’s most iconic natural feature and an  
4 ecological icon for the community. (Declaration of Scott W. Ditfurth (“Ditfurth Decl.”), ¶ 2,  
5 Exhibit A, Declaration of Jeff Bond (“Bond Decl.”), ¶ 2.)<sup>2</sup> Among other things, Albany Hill  
6 appears on the City seal. (*Id.*) The City has acquired most of the ridgeline and upper slopes, and  
7 it protects those areas as permanent open space. (*Id.*) In a recent survey of residents, Albany Hill  
8 was the fourth most visited public open space out of 13 facilities. (*Id.*) Albany Hill Park is also  
9 home to several plant communities.<sup>3</sup> (*Id.*) One of the City’s stated objectives for Albany Hill Park  
10 is to manage vegetation on the hill to reduce fire hazards, restore native habitat, and provide  
11 appropriate levels of public access by maintaining and expanding the system of trails, including  
12 connections between Creekside Park and the neighborhoods on Albany Hill’s perimeter. (*Id.*)

13 The City is now, and has been for some time, the fee owner of the real property (i.e., Albany  
14 Hill Park) on which the cross is located, more particular described as Assessor Parcel Numbers  
15 066-2754-14-05 and 066-2754-40-03 (“Subject Property”).<sup>4</sup> (Complaint, ¶ 19; Ditfurth Decl., ¶ 2,  
16 Exhibit A, Bond Decl., ¶ 2.) The City acquired the Subject Property on or about August 21, 1973,  
17 after it accepted a land donation from the corporation that purchased the Subject Property from  
18 Plaintiff’s former member. (*Id.*) As part of the conveyance from Plaintiff’s former member to the  
19 corporation, and, eventually, from the corporation to the City, the seller excepted from the sale an

20  
21 <sup>2</sup> With these opposition papers, the City is concurrently filing a request to judicially notice Exhibits  
22 A through G as referenced and attached to the Declaration of Scott Ditfurth.

23 <sup>3</sup> Coast live oak woodland occurs on the northern and eastern slopes of the Hill, and along the banks  
24 of the City’s creeks. (*Id.*) Coast live oaks dominate the canopy in these areas, with other species  
25 such as bigleaf maple, arroyo willow, California bay, California buckeye, and coast redwood  
26 present. (*Id.*) Eucalyptus groves dominate the ridgeline and western slopes. (*Id.*) Several  
significant plants on the East Bay California Native Plant Society’s watch list are found on Albany  
Hill, including red fescue, big squirrel tail grass, gumplum, golden aster, California Melic grass,  
purple needlegrass, and marsh bristlegrass. (*Id.*) The eucalyptus groves on Albany Hill have  
sheltered roosting Monarch Butterflies. (*Id.*)

27 <sup>4</sup> The legal definitions, legal descriptions, and depictions of the Subject Property are more fully set  
28 forth in the City’s Complaint in Eminent Domain. (Ditfurth Decl., ¶ 3, Exhibit B, Complaint in  
Eminent Domain.)

1 easement, in Plaintiff’s favor, for ingress/egress over the Subject Property to maintain the cross on  
 2 Albany Hill Park. (Complaint, ¶ 16.) This complex transaction involving Plaintiff, its former  
 3 member, the corporation, and the City, among others, resulted in a series of lawsuits concerning  
 4 the Subject Property. (Complaint, ¶ 19; Diturth Decl., ¶ 2, Exhibit C, *Lions Club of Albany,*  
 5 *California v. City of Albany*, 323 F.Supp.3d 1104 (N.D. Cal. 2018) (“*Lions Club I*”) (summarizing  
 6 history of the litigation.)<sup>5</sup>

7 **B. The Court In Plaintiff’s First Federal Lawsuit, *Lions Club I*, Finds That The**  
 8 **City Must Remedy Its Establishment Clause Violation For Having A Religious**  
 9 **Symbol Prominently Displayed Upon A Public Park**

10 On September 11, 2017, Plaintiff filed an action in this court against the City for alleged  
 11 violations of the First and Fourteenth Amendments. (Complaint, ¶¶ 26-29, 35; Diturth Decl., ¶ 4,  
 12 Exhibit C, *Lions Club I*, 6:14-22.) In *Lions Club I*, Plaintiff alleged the City ordered the Pacific  
 13 Gas and Electric Company to shut down power to the cross for 106 days. (*Id.*) Plaintiff alleged  
 14 this decision was part of a continued campaign to harass Plaintiff even though the City had  
 15 legitimate safety concerns in carrying out that decision, including the ongoing fire hazard to the  
 16 public. (*Id.*) The City thereafter filed a Cross-Complaint against Plaintiff for Quiet Title,  
 17 Trespassing, Nuisance, and Declaratory relief. (Complaint, ¶ 37.)

18 The parties eventually filed dueling summary judgment motions, which the Honorable  
 19 William Alsup, granted in part, and denied in part. (Diturth Decl., ¶ 4, Exhibit C.) In so doing,  
 20 Judge Alsup stated, in no uncertain terms, that “The City Must Remedy Its First Amendment  
 21 Violation.” (*Id.* at 15:18-16:7.) Judge Alsup also held that **“the public park with the cross**  
 22 **violates the Establishment Clause” and that the “land cannot continue as a public park with**  
 23 **the cross on it.”** (*Id.* at 9:24-25, 14:20-22, emphasis added.) Because of this key finding, Judge  
 24 Alsup identified three possible choices for the City to overcome this critical issue. First, the City  
 25 could sell the portion of the Subject Property to a private owner where the easement and cross are  
 26 located.<sup>6</sup> (*Id.* at 15:19-20.) Second, the City could condemn the easement through its eminent

27 <sup>5</sup> The instant lawsuit is sometimes herein referred to as *Lions Club III*.

28 <sup>6</sup> Plaintiff continues to stress that because of this available option, the City should not exercise its eminent domain power at all. Plaintiff, however, has failed to cite any authority whatsoever that

1 domain power. (*Id.* at 15:20-21.) Third, the City could adopt a zoning ordinance to ban all religious  
 2 symbols from its public spaces. (*Id.* at 15:21-22.) The Ninth Circuit affirmed Judge Alsup's order.  
 3 *See, Lions Club of Albany, California v. City of Albany*, 788 F. App'x 428 (9th Cir. 2019). After  
 4 careful consideration, the City decided to explore condemning Plaintiff's easement interest in the  
 5 Subject Property, just as Judge Alsup had suggested.

6 **C. Following The Court's Ruling In *Lions Club I*, The City Initiated Eminent**  
 7 **Domain Proceedings Against Plaintiff**

8 By way of its Complaint in Eminent Domain, the City seeks to unencumber the Subject  
 9 Property from Plaintiff's easement. (Ditfurth Decl., ¶ 2, Exhibit A, Bond Decl., ¶ 4.) The City's  
 10 proposed acquisition, including removal of the cross, is (1) for the public purposes and necessity  
 11 of enabling the public to more fully use and enjoy Albany Hill Park as an open space without the  
 12 encumbrance, and (2) to avoid any potential Establishment Clause issue arising from Plaintiff  
 13 maintaining the cross. (*Id.*; *Lions Club I*, 15:18-16:7 (finding that the City must address the cross  
 14 in Albany Hill Park due to the First Amendment).) Because of the very purpose for which the City  
 15 seeks to exercise its power of eminent domain, there is no other interest in land that the City could  
 16 use or acquire to remove the encumbrance on its fee interest and to avoid an Establishment Clause  
 17 issue arising from Plaintiff's religious display at Albany Hill Park. (Ditfurth Decl., ¶ 2, Exhibit A,  
 18 Bond Decl., ¶ 4.)

19 Generally, to exercise its eminent domain power, a public agency must formally appraise  
 20 the property or property interests that are sought to be acquired and make an offer to the property  
 21 owner for a value that is no less than the appraised amount. If the property owner rejects the public  
 22 agency's offer, or the parties are unable to negotiate a mutually acceptable purchase price, the  
 23 public agency must hold and duly notice a Resolution of Necessity hearing, at which point the  
 24 affected property owner has the right to be heard on the issues that the public agency's governing  
 25 board is considering, which are as follows: (1) the public interest and necessity require the proposed  
 26 project; (2) the proposed project is planned or located in the manner that will be most compatible  
 27

28 would otherwise compel the City to sell the property in dispute instead of condemning it. Indeed,  
 as the fee owner of the Subject Property, the City is free to utilize its property as it sees fit.

1 with the greatest public good and the least private injury; (3) the property is necessary for the  
 2 proposed project; and (4) the offer to purchase the property was made to the property owner for no  
 3 less than the appraised amount. Cal. Civ. Proc. Code § 1245.230. Here, the City followed each of  
 4 these steps as California’s Eminent Domain Law requires.

5 **1. The Disputed Easement’s Appraisal And The Pre-Condemnation**  
 6 **Negotiations That Followed**

7 The City appraised the Plaintiff’s easement for \$500,000, as determined by its independent  
 8 and licensed appraiser. (Complaint, ¶ 44.) The City provided a copy of this appraisal to Plaintiff  
 9 in a letter dated November 12, 2021, in which the City offered to purchase Plaintiff’s easement  
 10 interest for \$500,000. (Complaint, ¶ 44; Ditfurth Decl., ¶ 2, Exhibit A, Bond Decl., ¶ 6, Exhibit  
 11 A.) As of the time the City filed its Complaint in Eminent Domain, Plaintiff had not indicated  
 12 whether it would accept the City’s offer. (Ditfurth Decl., ¶ 2, Exhibit A, Bond Decl., ¶ 6.)

13 **2. After Conducting A Hearing In Which It Considered Public Comment,**  
 14 **The City Unanimously Adopts The Resolution Of Necessity**

15 The City duly noticed a public hearing for April 4, 2022, to consider whether a Resolution  
 16 of Necessity should be adopted, and it subsequently conducted the hearing as scheduled on that  
 17 date.<sup>7</sup> (Complaint, ¶¶ 45-51; Ditfurth Decl., ¶ 2, Exhibit A, Bond Decl., ¶¶ 7-11, Exhibits B-C.)  
 18 Plaintiff provided advance notice that it intended to appear at the hearing, and it voiced its objection  
 19 to the proposed Resolution of Necessity. (*Id.*) At the hearing, the City Council heard from, among  
 20 others, Plaintiff and its representatives as well as a number of individuals who disagreed with them.  
 21 (Ditfurth Decl., ¶ 2, Exhibit A, Bond Decl., ¶ 8.) Indeed, numerous members of the public voiced  
 22 their distaste of Plaintiff maintaining a cross on the Subject Property and forcing the City to pay  
 23 taxpayer money to have it removed. Ultimately, having considered all comments and information  
 24 presented, the City Council unanimously adopted Resolution Number 2022-32, a Resolution of  
 25 Necessity declaring the necessity of acquiring Plaintiff’s easement across Albany Hill Park, and  
 26 removing the cross itself, for the public purposes of unencumbering Albany Hill Park and the

27 \_\_\_\_\_  
 28 <sup>7</sup> City Council meeting agendas (in HTML and PDF format) along with video recordings of  
 meetings are also available online at: <https://www.albanyca.org/our-city/kalb-community-media/city-council-video-and-agendas>.

1 potential Establishment Clause issue that this Court previously identified in *Lions Club I*. (Ditfurth  
2 Decl., ¶ 2, Exhibit A, Bond Decl., ¶ 8, Exhibit B, Resolution No. 2022-32.)

3 **3. The Court Grants The City’s Motion For An Order For Prejudgment**  
4 **Possession And It Considers All The Same Arguments, Positions, And**  
5 **Claims Being Asserted In This Federal Lawsuit**

6 On May 4, 2022, the City filed its Complaint in Eminent Domain in the Alameda County  
7 Superior Court, styled as *City of Albany v. Albany Lions Club, Lions International, et al.*, and  
8 bearing case number 22CV010822 (“*Lions Club II*” or “State Court Action”). (Complaint, ¶ 58;  
9 Ditfurth Decl., ¶ 3, Exhibit B, Complaint in Eminent Domain.) The City filed a Motion for  
10 Prejudgment Possession of Plaintiff’s easement two days later, and it deposited \$500,000 in the  
11 State of California Condemnation Deposits Fund for withdrawal by Plaintiff as probable just  
12 compensation for the easement.<sup>8</sup> (Complaint, ¶ 59; Ditfurth Decl., ¶ 5, Exhibit D, Motion for  
13 Prejudgment Possession and Reply Brief; Ditfurth Decl., ¶ 6, Exhibit E, Notice of Deposit of  
14 Probable Just Compensation.) Plaintiff opposed the Motion for Prejudgment Possession, raising  
15 similar, if not the identical, arguments, positions, and claims being asserted in this current federal  
16 lawsuit, i.e., *Lions Club III*. (Complaint, ¶ 61; Ditfurth Decl., ¶ 7, Exhibit F, Plaintiff’s Opposition  
17 to Motion for Prejudgment Possession.) On August 30, 2022, the Court in *Lions Club II* granted  
18 the City’s Motion for Prejudgment Possession, and in the event the City decided to remove the  
19 cross, it ordered the City to preserve the cross in a safe location pending trial and final judgment in  
20 the State Court Action. (Ditfurth Decl., ¶ 8, Exhibit G, Prejudgment Possession Order.) In doing  
21 so, the court in *Lions Club II* considered the issues below that Plaintiff raised, and is raising again  
22 here, namely:

23  
24 <sup>8</sup> The immediate possession procedure is sometimes referred to as a “quick-take” eminent domain  
25 action. *Mt. San Jacinto Community College District v. Superior Court*, 40 Cal. 4th 648, 653  
26 (2007). “Because compensation is immediately available to the property owner in a quick-take  
27 action, the date of valuation of the property is statutorily required to be no later than the date the  
28 condemner deposits ‘probable compensation’ for the owner.” *Id.*; Cal. Civ. Proc. Code §  
1263.110 et seq.) The deposited money earns statutory interest until it is withdrawn, which the  
property owner may do immediately. *Id.* Doing so, however, waives the property owner’s right  
to dispute the taking, i.e., to assert a right-to-take challenge, other than the right to challenge the  
amount of just compensation. *Id.*; Cal. Civ. Proc. Code § 1255.260.

- 1 • The City “has no project to build.” (Ditfurth Decl., ¶ 7, Exhibit F, Plaintiff’s
- 2 Opposition, 1:27-28)
- 3 • The City’s “so-called ‘project’ is a possible Establishment Clause violation and its
- 4 alleged need to get fee simple title to a few lots which are subject to [Plaintiff’s]
- 5 easement to maintain the cross.” (Ditfurth Decl., ¶ 7, Exhibit F, Plaintiff’s
- 6 Opposition, 1:28-2:2)
- 7 • Plaintiff “will suffer substantial hardship if the Order for Possession is granted. If
- 8 the Order is granted the City will remove the cross. [Plaintiff] will be unable to light
- 9 the cross at Christmas and will be unable to hold its Easter service.” (Ditfurth Decl.,
- 10 ¶ 7, Exhibit F, Plaintiff’s Opposition, 2:14-16.)
- 11 • If the requested order is granted, Plaintiff “will be required to obtain a permit from
- 12 the City to restore the cross. Assuming the permit is granted, [Plaintiff] will need
- 13 to hire a contractor to construct and install a new cross. All this will cost time and
- 14 money.” (Ditfurth Decl., ¶ 7, Exhibit F, Plaintiff’s Opposition, 2:16-20.)
- 15 • The City’s underlying Resolution of Necessity is not entitled to a conclusive
- 16 presumption of validity. (Ditfurth Decl., ¶ 7, Exhibit F, Plaintiff’s Opposition, 4:1-
- 17 12.)
- 18 • “The City has failed to establish an overriding need for prejudgment possession and
- 19 failed to establish [it] will suffer a substantial hardship if possession is denied.”
- 20 (Ditfurth Decl., ¶ 7, Exhibit F, Plaintiff’s Opposition, 4:13-6:4.)
- 21 • Plaintiff “will suffer significant and permanent hardship if the cross is removed.”
- 22 (Ditfurth Decl., ¶ 7, Exhibit F, Plaintiff’s Opposition, 6:3-13.)
- 23 • The City failed to establish facts necessitating the exercise of eminent domain, and
- 24 neither the public interest, the necessity, nor the easement sought to be acquired are
- 25 necessary for any project. (Ditfurth Decl., ¶ 7, Exhibit F, Plaintiff’s Opposition,
- 26 6:14-22.)
- 27 • The City’s decision to adopt the challenged Resolution of Necessity was a gross
- 28 abuse of discretion, and there is no public need to condemn Plaintiff’s easement

1 interest in the Subject Property. (Ditfurth Decl., ¶ 7, Exhibit F, Plaintiff's  
2 Opposition, 7:2-10:7.)

- 3 • The City is depriving Plaintiff of, and interfering with, its free speech and free  
4 exercise of religion rights under the First Amendment and violating the  
5 Establishment Clause.

6 The court in the State Court Action further found that the City satisfied each of the four statutory  
7 elements for obtaining an order for prejudgment possession,<sup>9</sup> and City is entitled to a conclusive  
8 presumption that the requirements for exercising its eminent domain power have been established  
9 under California Code of Civil Procedure section 1240.030. (Ditfurth Decl., ¶ 8, Exhibit G,  
10 Prejudgment Possession Order.) Critically, the court determined that ordering prejudgment  
11 possession does not preclude Plaintiff from asserting any right-to-take challenge at trial. (*Id.* at 7  
12 (explaining that “[t]he City is correct that [Plaintiff] conflates the prerequisites for an order of  
13 prejudgment possession under [Code of Civil Procedure section] 1255.410 with the merits of an  
14 eminent domain right to take trial under Code of Civil Procedure [section] 1260.120.”). In reaching  
15 its decision, the court cited the Legislative Committee Comment following Code of Civil Procedure  
16 section 1255.410, which provides as follows:

17 It should be noted that the determination of the plaintiff's right to  
18 take the property by eminent domain is preliminary only. The  
19 granting of an order for possession does not prejudice the defendant's  
20 right to demur to the complaint or to contest the taking. Conversely,  
the denial of an order for possession does not require a dismissal of  
the proceeding and does not prejudice the plaintiff's right to fully  
litigate the issue if raised by the defendant.

21 Indeed, Plaintiff has alleged a right-to-challenge in the State Court Action, alleging all of  
22 the same arguments raised here. As described in more detail below, grounds for federal abstention  
23 exist because the very same claims Plaintiff is asserting in this lawsuit are currently pending in the  
24 State Court Action and have yet to be decided. Because there is yet to be a final decision on the

25 \_\_\_\_\_  
26 <sup>9</sup> To obtain an order for prejudgment possession, the moving party must show: (1) the plaintiff  
27 entitled to take the property by eminent domain; (2) the plaintiff deposited an amount no less than  
28 the appraised value; (3) there is an overriding need for the plaintiff to possess the sought-after  
property before final judgment is issued in the case, and the plaintiff will suffer a substantial  
hardship if the possession application is denied or limited; and (4) the hardship that the plaintiff  
will suffer if possession is denied or limited outweighs the defendant's hardship that would  
otherwise be caused by granting prejudgment possession. Cal. Civ. Proc. Code § 1255.410(d)(2).

1 merits with respect to Plaintiff’s right-to-take challenge, Plaintiff is unlikely to demonstrate a  
 2 likelihood of success on the merits for purposes of the instant motion. Plaintiff’s current action is  
 3 nothing more than an attempt to have this Court overrule a decision already made in the State Court  
 4 Action. Plaintiff did not seek a writ on the ruling in the State Court Action, but instead filed this  
 5 lawsuit. Plaintiff should not be permitted to forum shop its claims to overrule previous decisions  
 6 made in the State Court Action.

### 7 **III. LEGAL ARGUMENT**

#### 8 **A. Legal Standard For A Motion For Preliminary Injunction**

9 A preliminary injunction is “an extraordinary remedy that may only be awarded upon a  
 10 clear showing that the plaintiff is entitled to such relief.” *Winter v. Nat. Res. Def. Council, Inc.*,  
 11 555 U.S. 7, 22 (2008). To obtain the requested preliminary injunction, Plaintiff must demonstrate  
 12 that: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm absent an  
 13 injunction; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest.  
 14 *Id.* at 20; *Beaty v. Brewer*, 649 F.3d 1071, 1072 (9th Cir. 2011). As the moving party, Plaintiff has  
 15 the burden of proof on all four elements. *Baca v. Moreno Valley Unified Sch. Dist.*, 936 F.Supp.  
 16 719, 726 (C.D. Cal. 1996). Unless the moving party is able to carry the burden of persuasion, by a  
 17 clear showing, the request for a preliminary injunction should be denied. *Mazurek v. Armstrong*,  
 18 520 U.S. 968, 972 (1997). Plaintiff has the burden of proving the propriety of such an extraordinary  
 19 and drastic remedy by clear and convincing evidence. *In Defense of Animals v. U.S. Dept. of*  
 20 *Interior*, 737 F.Supp.2d 1125, 1131 (E.D. Cal. 2010).

21 Where an injunction is sought against the government’s actions, a higher showing is  
 22 required on the claimed harm’s imminence. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983);  
 23 *see also Kim v. City of Belmont*, 2018 WL 500269, at \*14 (N.D. Cal. 2018) (“The Court has held  
 24 that recognition of the need for a proper balance between state and federal authority counsels  
 25 restraint in the issuance of injunctions against state officers ... in the absence of irreparable injury  
 26 which is both great and immediate.”). The Separation of Powers Doctrine also counsels against  
 27 issuing injunctions intended to control a public entity. *Lewis v. Casey*, 518 U.S. 343, 349–50  
 28 (1996). As set forth in the sections that follow, Plaintiff cannot demonstrate the prerequisites for a

1 preliminary injunction.

2 **B. Plaintiff Is Unlikely to Succeed On The Merits**

3 **1. Dismissal And/Or Abstention Is Warranted Under The Circumstances**

4 *Pullman* abstention is warranted here. *Railroad Commission of Texas v. Pullman Co.*, 312  
5 U.S. 496 (1941) (“*Pullman*”). Eminent domain and, similarly, land use regulation are sensitive  
6 areas of public policy that are best left to the states to address. *San Remo Hotel v. City & County*  
7 *of San Francisco*, 145 F.3d 1095 (9th Cir. 1998). In the alternative, the City would seek abstention  
8 under *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (“*Colorado*  
9 *River*”). *Colorado River* abstention should be exercised where there is a pending state action arising  
10 out of the same controversy, based upon “considerations of wise judicial administration, giving  
11 regard to conservation of judicial resources and comprehensive disposition of litigation.” (*Id.*)

12 **a. The Court Should Abstain In Accordance With The *Pullman***  
13 **Doctrine**

14 “*Pullman* abstention is the oldest of the abstention doctrines and perhaps the easiest to  
15 understand.” *U.S. v. Morros*, 268 F.3d 695, 703 (9th Cir. 2001). It is “an equitable doctrine that  
16 allows federal courts to refrain from deciding sensitive federal constitutional questions when state  
17 law issues may moot or narrow the constitutional questions.” *Fireman’s Fund Ins. Co. v. City of*  
18 *Lodi*, 302 F.3d 928, 938, n.11 (9th Cir. 2002). “[F]ederal courts should abstain from decisions  
19 when difficult and unsettled questions of state law must be resolved before a substantial federal  
20 constitutional question can be decided. By abstaining in such cases, federal courts ... avoid both  
21 unnecessary adjudication of federal questions and ‘needless friction with state policies.’” *Columbia*  
22 *Basin Apartment Ass’n v. City of Pasco*, 268 F.3d 791, 801-02 (9th Cir. 2001) (“*Columbia Basin*”).

23 The Supreme Court has clarified that *Pullman* “abstention is appropriate where an  
24 unconstrued ... statute is susceptible of a construction by the state judiciary which might avoid in  
25 whole or in part the necessity for federal constitutional adjudication, or at least materially change  
26 the nature of the problem.” *Bellotti v. Baird*, 428 U.S. 132, 146-47 (1976) (internal citations  
27 omitted). A district court may abstain from exercising its jurisdiction under *Pullman* when three  
28 factors exist: “(1) the complaint must involve a ‘sensitive area of social policy’ that is best left to

1 the states to address; (2) ‘a definitive ruling on the state issues by a state court could obviate the  
 2 need for federal constitutional adjudication by the federal court’; and (3) ‘the proper resolution of  
 3 the potentially determinative state law issue is uncertain.’” *Cedar Shake and Shingle Bureau v.*  
 4 *City of Los Angeles*, 997 F.2d 620, 622 (9th Cir. 1993) (“*Cedar Shake*”) (invoking *Pullman*  
 5 abstention and reversing district court’s contrary conclusion where case challenged authority of  
 6 city to regulate building by banning wood shake roofs). All three factors are satisfied here.

7 Regarding the first factor, the Ninth Circuit has “consistently held that land use planning is  
 8 a sensitive area of social policy that meets the first requirement for *Pullman* abstention.” *San Remo*  
 9 *Hotel*, 145 F.3d at 1105 (remanding with instructions to abstain under *Pullman* at p. 1106); *see*  
 10 *also, e.g., Columbia Basin*, 268 F.3d at 802 (“[w]e often have held that land-use planning questions  
 11 ‘touch a sensitive area of social policy’ into which the federal courts should not lightly intrude”);  
 12 *C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983) (“*C-Y Development*”)  
 13 (land use planning is a sensitive area of social policy).

14 Here, the City’s Resolution of Necessity is consistent with all applicable rules and  
 15 regulations under state and federal law for exercising its eminent domain power to condemn  
 16 Plaintiff’s easement interest. Under both the California and United States Constitution, the  
 17 government may take private property for public use so long as just compensation is paid. Plaintiff  
 18 contends, both in the State Court Action and in this federal lawsuit, that the City decision to  
 19 condemn its easement interest is inappropriate because:

- 20 • The City has no project to build;
- 21 • It failed to identify a public project;
- 22 • The City has alternative means of avoiding the potential Establishment Clause issue  
 23 found in *Lions Club I* (namely, selling that portion of the Subject Property to  
 24 Plaintiff);
- 25 • Plaintiff will suffer a substantial hardship if the cross is removed;
- 26 • If the cross is removed and Plaintiff successfully asserts a right-to-take challenge, it  
 27 will not be able to restore the cross at Albany Hill Park;
- 28 • The City’s Resolution of Necessity is invalid;

- 1 • The City failed to establish an overriding need for prejudgment possession;
- 2 • The City failed to establish that it will suffer a substantial hardship if possession is
- 3 denied;
- 4 • Plaintiff will suffer significant and permanent hardship if the cross is removed; and
- 5 • The City is depriving Plaintiff of and interfering with its free speech and free
- 6 exercise of religion rights under the First Amendment and violating the
- 7 Establishment Clause.

8 Plaintiff focuses solely on the City's desire to avoid an Establish Clause problem, as Judge  
 9 Alsup noted in *Lions Club I*. However, Plaintiff has completely and consistently ignored the fact  
 10 that one of the stated reasons to conduct eminent domain was so the City could provide an  
 11 unencumbered park to its residents. (Ditfurth Decl., ¶ 2, Exhibit A, Bond Decl., ¶ 8, Exhibit B,  
 12 Resolution No. 2022-32.) The City's decision to plan for development of its own land (as a  
 13 reminder, the City is the Subject Property's fee owner) is similar to general plans individual cities  
 14 have adopted, challenges to which have been held to be subject to *Pullman* abstention. *E.g.*,  
 15 *Sederquist v. City of Tiburon*, 590 F.2d 278, 282 (9th Cir. 1978) (takings challenge to city's  
 16 adoption of a general plan that included plaintiffs' access road in the plan's open space element);  
 17 *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092, 1093, 1095 (9th Cir. 1976)  
 18 (takings challenge to city's adoption of general plan that designated plaintiff's property for  
 19 preservation of open space).

20 As for the second factor, the State Court Action may render Plaintiff's federal constitutional  
 21 claim moot or, at the very least, present it in a different posture. *Pullman* abstention does not  
 22 require that a ruling on the state issue by a state court could moot the federal constitutional issue.  
 23 It is enough that a ruling on the state issue by a state court could result in the federal constitutional  
 24 issue being "presented in a different posture." *Columbia Basin*, 268 F.3d at 801; *C-Y Development*,  
 25 703 F.2d at 380 ("Although abstention in this case may not obviate the need to decide all the federal  
 26 constitutional questions, it will substantially reduce the contours of such adjudication and place it  
 27 in a different posture."); *Richardson v. Koshiba*, 693 F.2d 911, 916 (9th Cir. 1982) (recognizing  
 28 that the "threshold inquiry" in a section 1983 procedural due process claim is whether the plaintiff

1 has been deprived of a property interest created by state law); *see also Sinclair Oil Corp. v. County*  
2 *of Santa Barbara*, 96 F.3d 401, 409 (9th Cir. 1996) (“*Sinclair Oil*”) (“For *Pullman* purposes,  
3 though, it is sufficient if the state law issues might ‘narrow’ the federal constitutional questions.”).

4 Here, if Plaintiff were to prevail on its right-to-take challenge, it would no longer be  
5 compelled to remove the cross from Albany Hill Park. Without being forced to remove the cross  
6 under the City’s power of eminent domain, the complained of constitutional harms in this federal  
7 lawsuit would be moot. Moreover, if Plaintiff were to lose on its right-to-take challenge, that could  
8 present Plaintiff’s current claims in a different posture, as Plaintiff would somehow need to show  
9 it can overcome a valid Resolution of Necessity to acquire the Subject Property. Thus, the second  
10 criterion for *Pullman* abstention is met.

11 The third *Pullman* factor likewise favors abstention. Uncertainty exists when a federal court  
12 cannot predict with confidence how a state court would decide an issue of state law. *Pearl Invest.*  
13 *Co. v. City & County of San Francisco*, 774 F.2d 1460, 1465 (9th Cir. 1985). The Ninth Circuit  
14 requires “only a minimal showing of uncertainty to satisfy the third *Pullman* factor in land use  
15 cases.” *VH Property Corp. v. City of Rancho Palos Verdes*, 622 F.Supp.2d 958, 964 (C.D. Cal.  
16 2009) (finding uncertainty as to how a California court would apply “peculiar facts” to determine  
17 whether a city abused its discretion in requiring a developer to demonstrate that a property met  
18 specified safety criteria); *see, e.g., Sinclair Oil*, 96 F.3d at 410 (finding uncertainty despite  
19 plaintiff’s “conventional inverse condemnation claim” that did not implicate “a novel claim of  
20 statutory construction” because the community plan at issue had not yet been challenged in a state  
21 court); *Columbia Basin*, 268 F.3d at 806 (finding uncertainty where no Washington court had  
22 evaluated the constitutionality of a land use ordinance under the unique provisions of the state  
23 Constitution).

24 Uncertainty exists here because the City does not know how the court in the State Court  
25 Action is going to resolve the constitutional underpinnings of Plaintiff’s right-to-take challenge.  
26 Thus, the third *Pullman* factor is satisfied because a prediction cannot be made with confidence  
27 that a state court would interpret the City’s Resolution of Necessity in the way Plaintiff seeks.  
28



1 comprehensive state action.” *Montanore*, 867 F.3d at 1167 (internal quotation marks and citations  
 2 omitted).

3 (4) “*the order in which the forums obtained jurisdiction*”

4 The City’s State Court Action was filed first, and Plaintiff did not decide to avail itself to  
 5 the federal court until after it received an adverse ruling granting the City prejudgment possession  
 6 of Plaintiff’s easement. Rendering the decision to grant the City’s prejudgment possession motion  
 7 demonstrates that the State Court Action has already made substantial progress. *See R.R. Street &*  
 8 *Co. v. Transport Ins. Co.*, 656 F.3d 966, 980 (9th Cir. 2011) (the state court made “significant  
 9 progress” in the lawsuit, having already “conducted discovery, initiated a phased approach to the  
 10 litigation and issued an order concerning foundational legal matters”).

11 (5) “*whether federal law or state law provides the rule of*  
 12 *decision on the merits*”

13 “The fact that state law provides the rule of decision on the merits in a case may favor a  
 14 stay, but only when the state law questions are themselves complex and difficult issues better  
 15 resolved by a state court.” *Montanore*, 867 F.3d at 1168 (internal quotation marks omitted). At  
 16 their core, Plaintiff’s contentions against the City’s proposed course of action is that its Resolution  
 17 of Necessity is invalid for reasons provided under state law.

18 (6) “*whether the state court proceedings can adequately protect*  
 19 *the rights of the federal litigants*”

20 There is no doubt that California state courts have authority to adjudicate eminent domain  
 21 and similar constitutional matters, and thus the State Court Action can adequately protect the rights  
 22 of the federal litigants. *See Montanore*, 867 F.3d at 1169 (state court proceeding adequate even  
 23 though state court refused to consider an alleged “Federal Land Policy Management Act defect”  
 24 when considering the validity of unpatented mining claims); *York v. City of Los Angeles*, 33  
 25 Cal.App.5th 1178, 1193 (2019) (state court adjudicating causes of action for inverse condemnation  
 26 and violation of civil rights, both of which were premised on an alleged regulatory taking).

27 (7) “*the desire to avoid forum shopping*”

28 “*Colorado River* helps combat forum-shopping by providing a mechanism for avoiding

1 duplicative litigation.” *Attwood v. Mendocino Coast Dist. Hosp.*, 886 F.2d 241, 245 (9th Cir. 1989).  
 2 Plaintiff filed the instant federal action only after it received an adverse ruling in the State Court  
 3 Action. Indeed, without even a final appealable order in the State Court Action, Plaintiff is seeking  
 4 another bite of the appeal. Rather than allowing proceeding to a right-to-take trial, Plaintiff decided  
 5 to file this lawsuit as a quasi-appeal of the State Court Action’s order granting the City’s motion  
 6 for prejudgment possession.

7 (8) “*whether the state court proceedings will resolve all issues*  
 8 *before the federal court*”

9 Regarding the last factor, whether the state court proceedings will resolve the federal action,  
 10 “[w]e do not require ‘exact parallelism’ under this factor; it is sufficient if the proceedings are  
 11 ‘substantially similar.’” *Montanore*, 867 F.3d at 1170 (internal quotation marks omitted).  
 12 “Moreover, we are particularly reluctant to find that the actions are not parallel when the federal  
 13 action is but a ‘spin-off’ of more comprehensive state litigation.” *Id.* (internal quotation marks  
 14 omitted). The federal and state court actions allege the same nucleus of facts: the City is violating  
 15 Plaintiff’s constitutional rights by exercising the power of eminent domain to condemn an easement  
 16 that has a religious symbol. Both complaints “attempt to accomplish the same goal” [*Montanore*,  
 17 867 F.3d at 1170], i.e., a judicial determination that the City’s condemnation action violates the  
 18 United States Constitution.

19 **2. The City Has A Legitimate Reason To Condemn The Subject Property,**  
 20 **And Is Neither Temporarily Nor Permanently Depriving Plaintiff’s**  
 21 **First Amendment Right To Exercise Religion Freely**

22 A resolution of necessity may be considered sufficient evidence of a public entity’s urgent  
 23 need to obtain possession. *Israni v. Superior Court*, 88 Cal.App.4th 621, 640 (2001). Only in rare  
 24 instances will courts disturb a legislative or administrative declaration, such as a resolution of  
 25 necessity, that the particular use is public or necessary. *See, People ex rel. Dep’t Pub. Works v.*  
 26 *Superior Court*, 68 Cal.2d 206 (1968).

27 The City owns the property that is the subject matter of this eminent domain action. Plaintiff  
 28 has a limited easement over the property for ingress and egress to maintain a cross situated on the

1 property. The City proposes a project required by public interest and necessity because the City  
 2 seeks to acquire the easement in order to unencumber public land and avoid any potential violation  
 3 of the Establishment Clause arising from Defendant’s display of a cross in the park. (Ditfurth Decl.,  
 4 ¶ 2, Exhibit A, Bond Decl., ¶¶ 2–4; see Cal. Civ. Proc. Code § 1240.680(a)(1) (“property is  
 5 presumed to have been appropriated for the best and most necessary public use if the property is  
 6 appropriated to public use as...a city park...”); see also *Lions Club of Albany, California v. City*  
 7 *of Albany*, 323 F.Supp.3d 1104, 1117 (N.D. Cal. 2018). Here, the property is already being utilized  
 8 as public space. Accordingly, the City’s intended use is presumed to be the best and most necessary  
 9 use. Additionally, the City’s legitimate and secular purpose in avoiding future Establishment  
 10 Clause litigation justifies the removal of the cross. See *Vasquez v. Los Angeles County*, 487 F.3d  
 11 1246, 1257 (9th Cir. 2007).

### 12 3. The City Is Not Depriving Plaintiff’s Constitutional Rights

13 Despite Plaintiff’s platitudes to the contrary, the City’s actions do not prevent Plaintiff, its  
 14 members, or the public from continuing to gather at Albany Hill Park to host and celebrate Easter  
 15 morning services, to pray, to worship, and to participate in other religious activities. (Motion, 9:1-  
 16 5). Plaintiff is free to use Albany Hill Park for any lawful purpose. Put another way, the City is not  
 17 preventing anyone from practicing religion, nor is it restricting anyone’s ability to express free  
 18 speech at Albany Hill Park or elsewhere. The City is simply condemning out an easement and  
 19 removing a cross on public property that it owns.

#### 20 C. Plaintiff Has Not And Cannot Demonstrate Irreparable Harm

21 Plaintiff bears a heavy burden to show that “irreparable injury is likely in the absence of an  
 22 injunction.” *Winters*, 555 U.S. at 21–22. To establish a likelihood of irreparable harm, conclusory  
 23 or speculative allegations are not enough. *Herb Reed Enters., LLC v. Fla. Entertainment*  
 24 *Management*, 736 F.3d 1239, 1250 (9th Cir. 2013). To satisfy the irreparable harm prong, a  
 25 plaintiff must prove that the irreparable harm was caused by the complaint of conduct, and that the  
 26 injunction will remedy that harm. *Sierra Club v. U.S. Department of Energy*, 825 F. Supp. 2d 142,  
 27 153 (D.D.C. 2011) (“A plaintiff may be irreparably harmed by all sorts of things, but the irreparable  
 28

1 harm considered by the court must be caused by the conduct in dispute and remedied by the relief  
2 sought.”).

3 Here, Plaintiff goes to great lengths to try and show that irreparable harm will be had  
4 regarding the removal of the cross. Plaintiff argues a parade of horrors regarding what may occur  
5 if the cross is removed. However, the State Court Action has already ruled that “if the City of  
6 Albany removes the Cross from the City Property, Albany shall preserve the cross in a safe location  
7 pending trial and final judgment in the action.” (Ditfurth Decl., ¶ 8, Exhibit G, Prejudgment  
8 Possession Order.) Accordingly, the City has already been ordered to preserve the cross in a safe  
9 location. There is no irreparable harm to the Plaintiff.

10 Moreover, as set forth herein, Plaintiff is neither an owner nor occupant of the Subject  
11 Property, but rather a mere easement holder. An easement is a nonpossessory interest in real  
12 property, thus the easement owner does not have the right to actual possession. *Marvin M. Brandt*  
13 *Revocable Tr. v. U.S.*, 572 U.S. 93 (2014). Any “hardship” Plaintiff suggests is mere conjecture.  
14 Indeed, potential loss to a party not in possession of the property in question does not amount to a  
15 substantial hardship. *See Israni*, 88 Cal.App.4th at 640-643 (2001). Because Plaintiff does not  
16 actually own or possess the Subject Property, the “hardships” set forth by Plaintiff do not provide  
17 a basis to grant a preliminary injunction.

18 On the other side, if the cross is not removed, as Judge Alsup previously stated it should be  
19 and, as the State Court already ruled could be, the City will suffer hardship, as there will be an  
20 unnecessary and ongoing risk of litigation due to the possibility that the cross raises concerns under  
21 the Establishment Clause. (Ditfurth Decl., ¶ 2, Exhibit A, Bond Decl., ¶ 11, Exhibit C (*Lions Club*,  
22 *supra*, 323 F.Supp.3d at 1115–17.) Additionally, the City is presently managing the property as a  
23 public park. The City has an ongoing and overriding need to continue managing the open space,  
24 with all of its plant and animal life, for the public, without interference of the maintenance of the  
25 cross. (Ditfurth Decl., ¶ 2, Exhibit A, Bond Decl., ¶ 11.) The City has an overriding need for  
26 possession of the property to be able to appropriately manage this open space. (*Id.*)

27 **D. It Is Unclear Whether Plaintiff Has Standing To Assert Its Claims**

28 Plaintiff’s standing to bring suit in federal court against the City for these claims must be

1 resolved before the merits of any claims may be considered. *See Association for Accessible*  
2 *Medicines v. Bonta*, 562 F. Supp. 3d 973, 981 (E.D. Cal. 2021). To establish standing under Article  
3 III of the United States Constitution, Plaintiff must have “(1) suffered an injury in fact, (2) that is  
4 fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by  
5 a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). “The plaintiff, as  
6 the party invoking federal jurisdiction, bears the burden of establishing these elements.” *Id.*  
7 Because the matter is at the pleading stage, Plaintiff must clearly allege facts demonstrating each  
8 of the aforementioned elements. *Id.* The United States Supreme Court has recognized that “an  
9 association has standing to bring suit on behalf of its members when: (a) its members would  
10 otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane  
11 to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires  
12 the participation of individual members in the lawsuit.” *Hunt v. Washington State Apple*  
13 *Advertising Commission*, 432 U.S. 333, 343 (1977).

14 Due to Plaintiff’s failure to state a claim for relief against the City in the underlying  
15 pleading, a ground upon which the City intends to move for dismissal under Federal Rules of Civil  
16 Procedure, Rule 12(b)(6), it is unclear whether Plaintiff has standing to obtain the requested  
17 preliminary injunction, let alone to maintain this lawsuit. The City basis its standing argument  
18 against Plaintiff on two separate but related grounds. First, Plaintiff has not brought a class action  
19 lawsuit, and as a result, Plaintiff may only assert claims on its own behalf.

20 The City owns fee title to the property, not Plaintiff. Plaintiff simply has a non-exclusive  
21 easement interest for ingress and egress to maintain the cross on the Subject Property. (Ditfurth  
22 Decl., ¶ 2, Exhibit A, Bond Decl., ¶ 2, Exhibit A). Plaintiff has no legal right to possess the land,  
23 nor is it the Subject Property’s record owner. *See Marvin M. Brandt Revocable Tr.*, 572 U.S. 93.  
24 Moreover, Plaintiff has no possessory interest in the land or the cross that would otherwise confer  
25 upon it proper standing. *See Dutcher v. Sanders*, 20 Cal.App.549 (1912).

26 Second, Plaintiff cannot demonstrate that its members would have standing to sue in their  
27 own right. Plaintiff has attempted to color some form of associational standing in its pleading by  
28 alleging that its unidentified, non-party members’ constitutional rights to freedom of religious

1 expression and speech are being impinged upon. (Complaint, ¶¶ 71, 74, 75, 76, 80, 82, 83, 86, 88,  
 2 89.) The same is true for Plaintiff’s allegations pertaining to the alleged violation of the Equal  
 3 Protection clause of the United States Constitution. (Complaint, ¶¶ 102-104, 106, 107.) To  
 4 illustrate, Plaintiff alleges:

- 5 • “public habits and traditions are easily changed such that once traditions and events  
 6 are terminated and locations are moved, *members of the public* forget, disregard,  
 7 abandon and fail to return to such traditions and events if and when they can be  
 8 reinstated[;]” (Complaint, ¶ 71).
- 9 • “[u]nless enjoined by this Court *the Lions* will be deprived of *their rights* to freely  
 10 exercise the Christian religion...” (Complaint, ¶ 74).
- 11 • “[u]nless enjoined by this Court *the Lions* will be deprived of *their rights* to  
 12 symbolically communicate the religious solace, comfort, and well-being which the  
 13 display of the Christian Cross conveys to residents of the community...”  
 14 (Complaint, ¶ 76).

15 None of these allegations, however, have been advanced by any evidence suggesting that any  
 16 individual member has a claim against the City under any theory, and Plaintiff cannot show its  
 17 members’ special interest to be served or particular right to be preserved. Even though Plaintiff  
 18 proffers a declaration from its immediate past President, Kenneth Berner, he does not allege any  
 19 constitutional harm to himself attributable to the City’s challenged conduct. (Motion for  
 20 Preliminary Injunction (“Motion”), Declaration of Kenneth Berner (“Berner Decl.”).) Rather, Mr.  
 21 Berner states, for example, Plaintiff’s ability to exercise its rights to free exercise of religion will  
 22 be effected by the condemnation action. (Motion, Berner Decl., ¶¶ 14-15). As for the declaration  
 23 of Plaintiff’s current president, Kevin Pope, he too does not allege any constitutional harm to  
 24 himself attributable to the City’s challenged conduct. (Motion, Declaration of Kevin Pope (“Pope  
 25 Decl.”).) Instead, Mr. Pope proffers testimony concerning physical damage to the cross, which is  
 26 a matter that can be, and is being, asserted in the State Court Action as part of a claim for just  
 27 compensation. (Motion, Pope Decl., ¶¶ 13-14.)

28 Moreover, Plaintiff is required to show that its membership was impacted by the City’s

1 acquisition of the easement and cross. However, Plaintiff’s claims in this action directly contradict  
2 its own bylaws. Plaintiff’s own Constitution and Bylaw state that its purpose is: “To Provide a  
3 forum for the open discussion of all matters of public interest; provided, however, that *partisan*  
4 *politics and sectarian religion shall not be debated by club members.*”<sup>10</sup> (Italics added). As  
5 Plaintiff’s members cannot advocate or even debate for particular religious belief, Plaintiff should  
6 not have standing to state that its particular religious beliefs have been impacted.

7 **IV. CONCLUSION**

8 Based upon the foregoing, the City respectfully requests that the Court deny Plaintiff’s  
9 Motion for a Preliminary Injunction.

11 Dated: October 7, 2022

BEST BEST & KRIEGER LLP

13 By: /S/ Scott W. Ditfurth  
14 SCOTT W. DITFURTH  
15 ANDREW G. SAGHIAN  
16 Attorneys for Defendant  
17 CITY OF ALBANY, a Charter City

BEST BEST & KRIEGER LLP  
ATTORNEYS AT LAW  
3390 UNIVERSITY AVENUE, 5TH FLOOR  
RIVERSIDE, CALIFORNIA 92502

27 <sup>10</sup> This language can be found on the Lions Club International Constitution and Bylaws at:  
28 <https://clubrunner.blob.core.windows.net/00000101144/en-us/files/homepage/lions-club-international-constitution-by-laws/Lions%20Club%20International%20Constitution%20&%20By-Laws.pdf>