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13 **UNITED STATES DISTRICT COURT**
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

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18 **THE LIONS CLUB OF ALBANY,**
19 **CALIFORNIA, A Nonprofit Corporation,**

20 **Plaintiff,**

21 **v.**

22 **THE CITY OF ALBANY, a Charter City; and**
23 **DOES 1 through 25;**

24 **Defendants.**

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28 Case No. 3:22-cv-05377-WHA
Related to 3:17-CV-05236

**PLAINTIFF, LIONS CLUB OF
ALBANY'S MEMORANDUM OF LAW
IN REPLY AND IN SUPPORT OF:**

**(1) APPLICATION TO TERMINATE
COURT'S STAY OF THIS ACTION,**

**(2) APPLICATION FOR TEMPORARY
RESTRAINING ORDER AND**

**(3) MOTION FOR PRELIMINARY
INJUNCTION**

Date: March 8, 25023

Time: 11:00 A.M.

Courtroom: 12, 19th Floor

Judge: Honorable William H Alsup

Trial Date: None Set

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FACTUAL BACKGROUND

1
2 For 45 years the City of Albany tolerated the Lions Club’s cross on Albany Hill Park. Then,
3 in 2016, in response to a group called "East Bay Atheists," the City commenced a campaign to
4 remove the cross. City council members expressed their desire that the cross be removed from
5 Albany Hill. Council member Nason issued a public statement saying, “[T]he Albany City Council
6 (including me) would like to replace it [the cross] with something nonsectarian. We envision a
7 site that could still be used for Easter services and other Christian and non-religious purposes.”
8 (See Nichols Declaration Document 9-3, Filed 9/23/22, pages 2-3.)

9 Next, the City convinced PG&E to shut off power to cross for 106 days, interfering with
10 the Lions Club’s ability to illuminate the cross as the Christmas holidays approached. In a recent
11 2023 Facebook post council member Nason admitted that the reason for the City’s refusal to allow
12 utility service to the cross to be reestablished was “The city council decided that rather than
13 rewiring its cross, it would like to replace it with a gathering spot where Christians could raise a
14 cross on Christmas and Easter but that could be used by others at other times.” (See Nichols
15 Declaration, Exhibit 6, Document 30-2, page 83.)

16 When the Lions Club sued the City for damages in US District Court, the City seized this
17 opportunity to attack the cross-- it counterclaimed for quiet title, claiming the Lions Club easement
18 to maintain the cross was void. This Court granted the Lions Club’s motion for summary
19 judgement, dismissing the City’s counterclaim. *Lions Club of Albany v. City of Albany*, 323 F.
20 Supp. 3d 1104 (N.D. Cal. 2018)

21 However, the City did not give up its campaign to remove the cross. At a city council
22 meeting on April 6, 2020, then private citizen, and now Mayor, Preston Jordon asked if a sign
23 could be erected to block the community’s view of the cross while another council member
24 suggested fast growing trees. (Nichols Declaration Document 9-3, Dated 9/23/22 page 3.)

25 In early 2022, over three years after the 2018 U.S. District Court Decision, the City decided
26 to condemn the Lions Clubs easement and remove the cross. The ostensible reason for the
27 condemnation, as articulated in the City’s proposed Resolution of Necessity, was “eminent domain
28 is necessary for the elimination of a potential Establishment Clause problem and to provide for an

1 unencumbered public park.” (See Resolution of Necessity Declaration of Robert Nichols,
2 Document 9-3, filed 9/23/22, Exhibit 1, pages 5-10)

3 After the Lions Club received the proposed Resolution, the Lions offered to buy the City's
4 underlying fee interest in the lot containing the cross. The cross would then be in private
5 ownership--there would be no establishment clause problem. (See Declaration of Robert Nichols,
6 Document 9-3, filed 9/23/22, Exhibit 2, page 15-21.) The City ignored this offer and passed the
7 Resolution of Necessity authorizing eminent domain without city council comment or discussion.
8 (See Declaration of Kenneth Berner, Document 9-1, Filed 9/23/22, Page 3 Paragraph 12)

9 On November 11, 2022, heeding this Court's advice, the Lions Club offered \$12,500 for
10 the City's underlying fee interest in the lot which contains the cross. The City rejected this offer a
11 day later (See Nichols Declaration filed 2/27/23 Exhibit 4, Document 30-2, page 76-78; and
12 Exhibit 5, Document 30-2 pages 79-8). Thus, proving the City's ostensible reason for condemning
13 the cross - "eminent domain is necessary for the elimination of a potential establishment clause
14 problem" - is a sham. Selling the lot, the cross stands on to the Lions Club, or any private party,
15 would solve the establishment clause problem at no cost to the City. Instead the City choses to
16 spend well over \$500,000 to condemn the cross. In doing so the City sides with atheists and others
17 who oppose the cross, and against Lions Club members and other Christians who pray and worship
18 at the cross. (See Declaration of Kevin Pope Document 9-2, Filed 9-23-22 paragraphs 2-9, pages
19 1 and 2. The US and California Constitutions forbid such discriminatory treatment.

20 On May 4, 2022 the City filed an eminent domain action to condemn the Lions Clubs
21 easement and cross. The Lions Club filed an Answer challenging the City's "right to take." Under
22 CCP §§ 1260.110 -1260.120 a trial will held to determine whether the City has the "right to take"
23 the easement and cross. That trial is set for July 17, 2023

24 On May 6, 2022, the City also filed a Motion for Prejudgment Possession pursuant to
25 CCP § 1255.410. Public agencies seek prejudgment possession when there is a compelling need
26 to build a public project prior to the agency getting title to the property. It can take years between
27 filing an eminent domain action and the agency getting title to the private property. (See
28 Declaration of Richard W. Covert Filed herewith.)

1 Here the City of Albany is building no project. Which poses the question --- Why did the
2 City seek prejudgment possession? The answer to that question is found in the City's General Plan
3 and zoning ordinance for Albany Hill Park. The City Zoning Map and Zoning Ordinance /Zoning
4 Code § 20.12.070 shows the Albany Hill Park as "Public Facilities" (See Nichols Declaration filed
5 2/27/23 Exhibit 8, Document 30-2, page 114. The cross is a structure that constitutes a
6 nonconforming use because it is no longer in compliance with the current Park and Open Space
7 provisions of the City's General Plan. The cross is privately owned and thus violates the City's
8 Zoning Ordinance which only allows "Public Facilities" at the Albany Hill Park. Replacing the
9 cross should it be taken down or removed would require a General Plan Amendment and an
10 Amendment of the Zoning Code. Even if the City Council was inclined to initiate these processes,
11 it would generate controversy. Any City of Albany resident could file a lawsuit objecting to an
12 amendment to the City's General Plan and Zoning Code that would permit construction of a
13 Christian cross in the Albany Hill Park.

14 Thus, as this court observed, "Once the cross is down, it is down for good." This sad fact
15 is true, even if the Lions Club prevails on the right to take issue. In light of these facts, the City's
16 persistence in defending Judge Chatterjee's recent Order reaffirming his original Order granting
17 the City possession of the Lions Club's cross is a cynical game of "heads I win, tails you lose."

18 To make matters worse, the City argues, that "Here, if Plaintiff were to prevail on its right
19 to take challenge, it would no longer be compelled to remove the cross from Albany Hill park."
20 The order for possession sought by the City, unless stayed or rescinded gives the City the right to
21 remove the cross NOW. Once again the City is attempting to "flim-flam" this Court.

22 The City will suffer no cognizable legal prejudice if a preliminary injunction is issued. But
23 if the preliminary injunction is not issued, the Lions Club's Constitutional rights to pray and
24 worship at the cross will be destroyed. This would be a shocking injustice.

25 ARGUMENT

26 **A. The City Has NOT Carried its Burden of Establishing Under Strict Scrutiny** 27 **There is a Compelling State Interest that is Narrowly Tailored to Advance that** 28 **Interest**

The First Amendment to the U.S. Constitution protects the rights of Lions Club members

1 to display a Christian cross, as well as prayer and worship at that cross. A Free Exercise of Religion
2 violation is established when a government entity burdens a sincere religious practice in a way that
3 is not neutral or generally applicable to all citizens. *Kennedy v. Bremerton Sch. Dist.*, No. 21-418,
4 2022 WL 2295034, (U.S. June 27, 2022) (quoting *Emp. Div., Dep't of Hum. Res. of Ore. v. Smith*, 494
5 U.S. 872, 881 (1990)); *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*,
6 No. 22-15827 (9th Cir. Aug. 29, 2022) There is no doubt that the City's attempt to terminate the
7 Lions Clubs easement and remove the cross by an eminent domain action burdens the Lions Club's
8 exercise of their First Amendment rights.

9 A First Amendment violation is established, unless the government can satisfy 'strict scrutiny'
10 by demonstrating its actions that burden First Amendment rights are justified by (1) a compelling state
11 interest and (2) are narrowly tailored in pursuit of that interest." *Kennedy* at 17; see also *Tandon v.*
12 *Newsom*, 141 S. Ct. 1294,1296; 209 L. Ed. 2d 355 (2021) (*per curiam*) The government has the burden
13 to establish that its actions satisfy strict scrutiny.

14 The City asserts that its "compelling governmental interest" is resolving the establishment
15 clause problem. However, the City need not remove the cross to resolve this problem. The City can
16 solve its establishment clause problem by accepting the Lions Club's offer to buy the lot where the
17 cross stands for \$12,500. Alternatively, the City can sell the property at auction to the highest
18 private bidder. This would be a narrowly tailored measure--it solves the City's Establishment
19 Clause problem and it enables the Lions Club to keep its easement and cross; a "win-win" for both
20 parties. Even if, arguendo, there is a compelling government interest to solve the Establishment
21 Clause problem, the City is obligated to narrowly tailor its actions to minimize any damage to the
22 Lions Club's constitutional rights.

23 In repeatedly rejecting this Lions Club's solution, the City exposes its true agenda is not to
24 solve the establishment clause problem-- rather, it wants to destroy the cross. The 1st Amendment
25 forbids such discriminatory conduct. The City's actions do not survive strict scrutiny.

26 **B. The City Has Targeted the Albany Hill Cross for Removal Because**
27 **the City Disapproves of The Christian Symbol Displayed on the Hill**

28 The protections of the Free Exercise Clause of the Constitution apply if the action at issue

1 discriminates against religious beliefs or regulates or prohibits conduct because it is undertaken
2 for religious reasons.

3 In *Church of the Lukumi Babalu Aye, Inc v. City of Hialeah*, 508 U.S. 520 (1993), the City
4 of Hialeah passed several ordinances prohibiting public or private animal sacrifices. The Church
5 practiced the Santeria religion which employed animal sacrifices as a part of their religious
6 ceremonies. The Supreme Court held that although the City had a legitimate interest in preventing
7 unnecessary cruelty to animals, as well as public health interests, its ordinances violated the First
8 Amendment because they were not narrowly tailored to achieve legitimate goals. The Supreme
9 Court rejected the contention that the constitutional inquiry is limited to the text of the laws at
10 issue. Justice Kennedy stated,

11 “Facial neutrality is not determinative. The Free Exercise Clause, like the
12 Establishment Clause, extends beyond facial discrimination. The Clause "forbids
13 subtle departures from neutrality," and "covert suppression of particular religious
14 beliefs,” Official action that targets religious conduct for distinctive
15 treatment cannot be shielded by mere compliance with the requirement of facial
16 neutrality. The Free Exercise Clause protects against governmental hostility which
17 is masked as well as overt.” *Lukumi, supra.* at 534

18 In the present matter, the City council has displayed hostility toward to the cross since 2016.

19 In determining if the government’s actions were neutral under the Free Exercise Clause
20 relevant evidence includes the historical background of the decision under challenge, the specific
21 series of events leading to the enactment or official policy in question the legislative history
22 including contemporaneous statements made by members of the decision-making body. *Lukumi,*
23 *supra,* at 540.

24 The evidence presented in the Lions Club’s declarations show that members of the city
25 council along with members of the public have been hostile to the cross. They have made
26 statements calling for its removal. The City caused the utility service to be disconnected and
27 council member Nason admits that the City refused to allow it to be reconnected in order to cause
28 removal of the cross. When sued, the City immediately filed a counterclaim attempting to get this

1 court to find the easement invalid. Since the 2018 ruling city council members have continued to
2 make statements condemning the cross. The city council recently passed the resolution of
3 necessity without any comment or discussion of alternatives or consideration of the Lions offer.
4 A subsequent written offer to purchase was rejected within 24 hours. Also telling is the City's
5 immediate filing for prejudgment possession, despite having no project to build, and no need for
6 possession.

7 The City's actions have not been neutral, but rather biased against the cross. The City's
8 eminent domain action is a mask, a subterfuge, concealing its anti-Christian bias.

9 In *Church of the Lukumi* Justice Kennedy issued a warning which is appropriate to this
10 case when he wrote,

11 "The Free Exercise Clause commits government itself to religious tolerance, and upon even
12 slight suspicion that proposals for state intervention stem from animosity to religion or
13 distrust of its practices, all officials must pause to remember their own high duty to the
14 Constitution and to the rights it secures. Those in office must be resolute in resisting
15 importunate demands and must ensure that the sole reasons for imposing the burdens of
16 law and regulation are secular. Legislators may not devise mechanisms, overt or disguised,
17 designed to persecute or oppress a religion or its practices. The laws here in question were
18 enacted contrary to these constitutional principles, and they are void." *Lukumi supra at 547*

19 The City of Albany, in its actions from 2016 to this day, have consistently violated the
20 standards the U.S. Supreme Court set in the 1993, *Lukumi* decision.

21 **C. The City Has Not Attempted to Justify its Actions Under Strict Scrutiny**

22 The City offers no competent evidence of a compelling governmental interest in removing
23 the cross, given the Lions Club's offer. Nor has the City explained why it is not willing to resolve
24 the Establishment Clause problem by the sale of the lot containing the cross which allows the
25 Lions to keep their easement and cross.

26 Instead, the City points to CCP § 1245.250 and continues to repeat the mantra of
27 "conclusive presumption." Judge Chatterjee echoes the City's position in his latest order of
28 January 30, 2023, where he writes, "How the City chooses to cure the Establishment Clause

1 violation is a legislative choice up to the elected officials of the City of Albany.” (See Exhibit 1,
2 Superior Court Order, Nichols Declaration, Document 30-2, page 9.

3 The City and the Superior Court both ignore the fact that constitutional rights are at stake.
4 If it were as simple as a conclusive presumption of the legitimacy of legislative action, regardless
5 of the constitutionality of that action, the First Amendment would be meaningless.

6 The evidence supports a finding that the City is not acting in a neutral manner but rather
7 exercising an Atheist / anti-Christian bias in violation of the First Amendment. The asserted
8 “conclusive presumption” does not supersede the Lions Club’s First Amendment rights.

9 **D. The Anti-Injunction Act (28 USC § 2283) is NOT Applicable to this Action**

10 The Anti-Injunction Act is inapplicable to the City’s eminent domain action. The Anti-
11 Injunction Act provides,

12 “A court of the United States may not grant an injunction to stay
13 proceedings in a state court except as expressly authorized by Act of
14 Congress, or where necessary in aid of its jurisdiction, or to protect or
effectuate its judgments.” (28 USC § 2283)

15 FIRST, the Lions Club did not seek an injunction staying proceedings in the
16 Alameda County condemnation action. The requested Preliminary Injunction in this matter is to
17 prohibit the City of Albany from removing the cross until the Constitutionality of the City’s
18 resolution of necessity and eminent domain proceedings can be determined.

19 SECOND, actions brought pursuant to 42 USC § 1983 are an expressly authorized
20 exception to that law. *Mitchum v. Foster*, 407 U.S. 225, 243; 92 S. Ct. 2151 (1972). This action is
21 brought pursuant to 42 U.S.C. §1983. The Supreme Court went on to hold that federal injunctive
22 relief against a state court proceeding can be essential to prevent irreparable loss of a person's
23 constitutional rights. *Mitchum v. Foster, supra*, at 242.

24 **E. Abstention is Not Appropriate**

25 The purpose of 42 U.S.C. § 1983 is the opening of the federal courts to private citizens,
26 offering a federal remedy against incursions under the claimed authority of state law upon rights
27 secured by the Constitution and laws of the Nation. *Mitchum v. Foster, supra*, at 239.

28 In its November 17, 2022, Order, this Court temporarily stayed the order of prejudgment

1 possession and attempted to give guidance to Judge Chatterjee. Contrary to the suggestions of this
2 Court, Judge Chatterjee ignored any consideration of the Lions Club's free exercise of religion
3 rights and merely deferred to the City's legislative choice. The state court's actions are an incursion
4 upon the Lions Club's constitutional rights, the very reason Section 1983 was created.

5 **1. Pullman Abstention is Not Appropriate**

6 The doctrine of abstention, under which a District Court may decline to exercise or
7 postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a
8 District Court to adjudicate a controversy properly before it. *Pullman* abstention is appropriate
9 when the case touches on a sensitive area of states' social policy upon which the federal courts
10 ought not enter unless no alternative to its adjudication is open. *Confederated Salish v. Simonich*,
11 29 F.3d 1398, 1407 (9th Cir. 1994) [Citations omitted]

12 In First Amendment cases, the Pullman doctrine "will almost never be applicable because
13 the guarantee of free expression is always an area of particular federal concern. "Indeed,
14 constitutional challenges based on the first amendment right of free expression are the kind of
15 cases that the federal courts are particularly well suited to hear. That is why abstention is generally
16 inappropriate when first amendment rights are at stake." *Porter v. Jones*, 319 F.3d 483, 492 (9th
17 Cir. 2003) [Citing U. S. *Ripplinger v. Collins*, 868 F.2d 1043, 1048 (9th Cir. 1989)]

18 The present case involves the City's interference, and impending deprivation of the Lions
19 Club's First Amendment rights of Free Exercise of Religion and Free Speech which are
20 particularly appropriate for resolution in Federal Court.

21 **2. Colorado River Abstention is Not Appropriate**

22 The exercise of abstention under the Colorado River doctrine is inappropriate. The
23 *Colorado River Water Cons. Dist. v. U.S.*, 424 U.S. 800 (1976) case involved conflicting claims
24 to the allocation of Colorado River water which was divided into seven water divisions. Each
25 division had an established procedure for the settlement of water claims. Water rights were also
26 claimed by Indian tribes, as well as rights based on the laws of several states. Thus, the Colorado
27 River case involves unique and complex issues involving multiple parties. The present case is
28 totally different because it involves only two parties and not multiple parties with competing

1 complains.

2 **CONCLUSION**

3 The cross has stood for 50 years. It was constructed on a valid easement prior to the City's
4 acquisition of land for the Albany Hill Park. The City knew that the presence of the cross in the
5 park created a potential Establishment Clause problem, but did nothing for 45 years. Then, in early
6 2022 the City made an irrevocable decision to remove the cross, via an eminent domain action.

7 The City has consistently refused to consider or adopt less burdensome, and less expensive
8 alternatives to condemning the cross. The alternative solution offered by the Lions Club will resolve
9 the Establishment Clause problem, at no expense to the City. And it will preserve the Lions Club's
10 constitutional rights of free exercise of religion and free speech. The Lions Club's offer will burden
11 neither party.

12 The City insists on pursuing its condemnation action. It insists on enforcing an Order of
13 Possession which allows it to remove the cross--knowing full well that once the cross is down it is
14 down for good. And that the Lions Club will never be able to rebuild it even if the Lions Club
15 defeats the City's "right to take."

16 The ultimate resolution of this dispute rests on the application of the constitutional principles
17 set forth herein. Namely, whether the City can carry its burden to show a compelling governmental
18 interest in removing the cross by condemnation when other solutions are available. And whether
19 the City can show that its condemnation action is narrowly tailored to cause the least injury to the
20 Lions Club's constitutional rights.

21 The recent Order of Judge Chatterjee reconfirming his original Order granting prejudgment
22 possession, despite this Court's admonitions and guidance and other evidence the Lions Club
23 submitted, make it crystal clear that the State Court will not recognize the Lions Club's
24 constitutional rights--that only this Court will give the Lions Club a fair and impartial hearing.

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For these reasons this Court should grant the Lions Club relief from the stay of proceedings in this case, and issue a preliminary injunction prohibiting the City from removing the cross, and from taking any further steps to take the Lions Club's easement by eminent domain.

Dated: March 6, 2023

Respectfully submitted,

/S/ ROBERT E. NICHOLS

Robert E. Nichols
Attorney for Plaintiff,
Lions Club of Albany

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CERTIFICATE OF PROOF OF SERVICE

I, ROBERT E. NICHOLS, 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 MEMORANDUM OF LAW IN REPLY AND IN SUPPORT OF TERMINATION OF THE STAY IN THIS ACTION; TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**
- **DECLARATION OF RICHARD W. COVERT IN SUPPORT OF PRELIMINARY INJUNCTION.**

on SCOTT W. DITFURTH, ESQ, and ANDREW SAGHIAN, ESQ. attorneys for the City of Albany, pursuant to agreement with counsel, by electronically transmitting (emailing) an electronic copy of each document to: scott.ditfurth@bbklaw.com and andrew.saghian@bbklaw.com on March 6, 2023.

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 March 6, 2023 at Albany, California.

/S/ Robert E. Nichols

Robert E. Nichols