



June 30, 2005

Patrick J. Fisher, Clerk
 United States Court of Appeals
 for the Tenth Circuit
 1823 Strout Street
 Denver, Colorado 80257

Re: *Utah Gospel Mission et al. v. Salt Lake City Corporation et al.*, No. 04-4113; Supplemental Authority F.R.A.P. Rule 28(j) Filing.

Dear Mr. Fisher:

Enclosed is the Supreme Court's recent decision in *McCreary County v. American Civil Liberties Union of Kentucky* 545 U.S. --- (June 27, 2005). The decision categorically rejects the main arguments asserted by the defendants about the meaning of the Establishment Clause inquiry required by this case. First, the inquiry into purpose is not only constitutionally permissible, but required. *Op.* at 10. Second, the Establishment Clause forbids government action that has a predominantly religious purpose, even if it does not have an exclusively religious purpose. *Op.* at 15-17. The Court specifically rejected the argument that the proffered governmental reason must be entirely a sham or pre-textual in order for plaintiffs to prevail. It is sufficient if the asserted secular purposes are secondary. *Id.* Third, courts should view shifting, *post hoc* purposes with appropriate skepticism. *Op.* at 17-19. The Court declined to limit the scope of the purpose inquiry under a standard oblivious to the context in which the dispute arose. *Id.* The history of this litigation – especially the Mayor's actions prior to the relinquishment of the easement – has irreversibly tainted the later decision to accede to the Church's demands. *Id.* at 18, n. 14. In addition, the Court was careful to explain that the main value of the Establishment Clause is to guard against the civic divisiveness that follows when government weighs in on one side of a religious debate. *Id.* at 28. The city's decision to relinquish the easement has fueled that divisiveness because of the perception that the city has sided with the LDS Church rather than protect the public's interest in the property following the first litigation.

The predominant reasons the city gave in to the demands of the Church were to protect the Church from outside First Amendment activity and to bring an end to the community divisiveness that the *Church's* actions were driving. These are sectarian purposes. Despite the other public

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benefits exacted by the city, the reasonable observer “would probably suspect that the [city] was simply reaching for any way to [protect the Church’s interests].” *Id.* at 25. This is sufficient to prevail under *McCreary*.

Sincerely yours,

Mark Lopez
Attorney for Appellants

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cc: All counsel