

APPEAL NOS. 08-56415 & 08-56436
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEWISH WAR VETERANS OF THE UNITED STATES
OF AMERICA, INC., STEVE TRUNK, *et al.*,

Plaintiffs-Appellants,

v.

CITY OF SAN DIEGO, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of California
Nos. 3:06-cv-01597-LAB-WMC, 3:06-cv-01728-LAB-WMC
(Hon. Larry A. Burns)

**Brief of *Amicus Curiae* The American Legion Department of California
in Support of Defendants-Appellees and Affirmance**

Joseph P. Infranco
ALLIANCE DEFENSE FUND
15100 North 90th Street
Scottsdale, Arizona 85260
(480) 444-0020

Rees Lloyd
THE AMERICAN LEGION
DEPARTMENT OF CALIFORNIA
44921 Palm Ave.
Hemet, California 92544
(951) 867-1551

Timothy D. Chandler
ALLIANCE DEFENSE FUND
101 Parkshore Drive, Suite 100
Folsom, California 95630
(916) 932-2950

Attorneys for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus curiae The American Legion Department of California states that it does not have a parent corporation and no publicly-held corporation holds 10% or more of its stock.

AUTHORITY TO FILE *AMICUS CURIAE* BRIEF

All parties have consented to the filing of this brief.

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IDENTITY AND INTEREST OF AMICUS

The American Legion Department of California represents some 130,000 Legionnaires organized in Posts, Districts, and Areas throughout the State of California. The American Legion was chartered by Congress in 1919 as a patriotic, mutual-help, war-time veterans organization. Since its inception, The Legion has maintained an ongoing concern and commitment to veterans and their families, and is a tireless advocate for veterans' rights. It is dedicated to preserving American values, promoting patriotism and encouraging selfless service and sacrifice among the Nation's youth. And it seeks to honor the sacrifice for our country of those men and women of our armed forces who have gone before us, support those who continue to sacrifice for our country today, and prepare those who will be called to sacrifice for all of us in the future.

To this end, the Department of California has established, through a working relationship with the Alliance Defense Fund, the Defense of Veterans Memorials Project, with the express mission of defending veterans memorials throughout California, including the Mt. Soledad National War Memorial.

INTRODUCTION

The Mt. Soledad cross has stood as part of a veterans memorial for more than fifty years.¹ Today, this memorial is accompanied by six concentric walls with over 2,400 individual plaques bearing names, messages, and digitally-etched photos of veterans. Encircling the walls are 23 bollards recognizing community and veterans organizations. An American flag stands at the memorial, paying tribute to the national cause of freedom. And brick pavers bear additional messages honoring veterans and supporters of Mt. Soledad. This collection of messages honoring our nation's heroes, accompanied by the memorial cross, sends a diverse message of appreciation for the gallantry and patriotism of those that gave their lives for the rest of us. Veterans throughout the Nation's history have sacrificed their lives for something greater than themselves. And the Mt. Soledad Veterans Memorial honors that sacrifice.

ARGUMENT

In *Van Orden v. Perry*, the Supreme Court upheld the constitutionality of a Ten Commandments monument that was donated to the State of Texas by the Fraternal Order of Eagles in 1961, and is on display on public property outside the

¹This is the third cross that has stood atop Mt. Soledad. The first was constructed by private citizens in 1913. It was destroyed in 1924, and replaced in 1934. The second cross was destroyed in 1952, and replaced with the current cross in 1954. *Paulson v. City of San Diego*, 294 F.3d 1124, 1125 (9th Cir. 2002). Thus, not only has the current cross been in place for more than fifty years, but there have been crosses atop Mt. Soledad for most of the past century.

Texas State Capitol Building. 545 U.S. 677, 681, 692 (2005). Both the plurality opinion and Justice Breyer's controlling concurrence concluded that the three-part test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), should not be used to evaluate the constitutionality of passive religious monuments that have historical significance. See *Van Orden*, 545 U.S. at 686; *id.* at 700 (Breyer, J., concurring); see also *Card v. City of Everett*, 520 F.3d 1009, 1016 (9th Cir. 2008) (since *Van Orden*, "we do not use the *Lemon* test to determine the constitutionality of some longstanding plainly religious displays that convey a historical or secular message in a non-religious context."). As such, *Van Orden*'s analysis governs this case.

The facts in *Van Orden* are virtually identical to those here. Both cases involve (1) a passive religious monument, (2) donated to the government by a private party, (3) displayed on government property, (4) along with numerous other secular monuments, (5) that has been in existence for decades. This Court should stay the jurisprudential course set by *Van Orden* and hold that Mt. Soledad cross does not violate the Establishment Clause.

I. The Mt. Soledad Veterans Memorial cross survives constitutional scrutiny under *Van Orden*'s plurality opinion.

Writing for the plurality, Chief Justice Rehnquist cast off the *Lemon* test, choosing instead to evaluate the historical significance of the monument and probing whether that significance extends beyond its religious meaning:

Whatever may be the fate of the *Lemon* test in the larger scheme of

Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history.

Id. at 686.

His analysis began with the irrefutable premise that “[t]here is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789.” *Id.* (quoting *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984)). After cataloguing numerous references to religion prominent in presidential proclamations, national monuments, and the Supreme Court's decisions, the Chief Justice specifically highlighted the government's frequent acknowledgment of the Ten Commandments and their significant historical role in our Nation's heritage:

We need only look within our own Courtroom. Since 1935, Moses has stood, holding two tablets that reveal portions of the Ten Commandments written in Hebrew, among other lawgivers in the south frieze. Representations of the Ten Commandments adorn the metal gates lining the north and south sides of the Courtroom as well as the doors leading into the Courtroom. Moses also sits on the exterior east facade of the building holding the Ten Commandments tablets.

Similar acknowledgments can be seen throughout a visitor's tour of our Nation's Capital. For example, a large statue of Moses holding the Ten Commandments, alongside a statue of the Apostle Paul, has overlooked the rotunda of the Library of Congress' Jefferson Building since 1897. And the Jefferson Building's Great Reading Room contains a sculpture of a woman beside the Ten Commandments with a quote above her from the Old Testament (Micah 6:8). A medallion with two tablets depicting the Ten Commandments decorates the floor

of the National Archives. Inside the Department of Justice, a statue entitled “The Spirit of Law” has two tablets representing the Ten Commandments lying at its feet. In front of the Ronald Reagan Building is another sculpture that includes a depiction of the Ten Commandments. So too a 24-foot-tall sculpture, depicting, among other things, the Ten Commandments *and a cross*, stands outside the federal courthouse that houses both the Court of Appeals and the District Court for the District of Columbia. Moses is also prominently featured in the Chamber of the United States House of Representatives.

Id. at 688-89 (italics added); *see also McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 874 (2005) (“[O]ur own courtroom frieze was deliberately designed in the exercise of governmental authority so as to include the figure of Moses holding tablets exhibiting a portion of the Hebrew text of the later, secularly phrased Commandments; in the company of 17 other lawgivers, most of them secular figures, there is no risk that Moses would strike an observer as evidence that the National Government was violating neutrality in religion.”).

Given the deep roots the Ten Commandments have embedded in our Nation’s heritage, the Chief Justice concluded that displaying the monument carries a “dual significance” – it bears an “undeniable historical meaning” along with, but distinct from, its clear religious import. *Van Orden*, 545 U.S. at 690, 691. As such, it is perfectly appropriate for a state to honor that history as part of a collection of monuments representing its political and legal history. *Id.* at 692.²

² It is worth noting that one of the dissenters in *Van Orden* was Justice O’Conner, who has since been replaced by Justice Samuel Alito. Justice Alito’s opinions,

A. The cross has historical significance in memorializing those who gave the ultimate sacrifice for something greater than themselves.

The Latin cross, much like the Ten Commandments, is deeply ingrained in our Nation's history, particularly its military history and culture. The district court discussed several of the multitude of memorials throughout the country that use the Latin cross to honor veterans who have given their lives in service to this country. *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199, 1215-16 (S.D. Cal. 2008). These include the Argonne Cross, the Canadian Cross of Sacrifice, and the Mexico City War Memorial, which sit among the graves in Arlington National Cemetery; the Irish Brigade Monument at Gettysburg National Military Park; a memorial to servicemen who endured the Bataan Death March in Taos, New Mexico; and a veterans memorial erected and maintained by *amicus* in La Mesa, California. *Id.*

Perhaps most telling of America's profound history of using crosses to memorialize her war dead are the tens of thousands of crosses that mark the graves in American military cemeteries around the world. The rows of white crosses in these cemeteries are one of the most enduring and well-known images honoring our veterans.

while a Third Circuit Court of Appeals judge, indicate that he likely would agree with the plurality in *Van Orden*. See, e.g., *American Civil Liberties Union of N.J. ex rel. Lander v. Schundler*, 168 F.3d 92, 105-07 (3d Cir. 1999) (stating "we held that, in determining whether a government practice endorses religion, the history and ubiquity of a practice is relevant" and rejecting an argument that a municipality cannot display religious items constitutionally once it displays them in an unconstitutional fashion) (citation and quotation marks omitted).

Congress established the American Battle Monuments Commission in 1923 to honor the service, achievements, and sacrifice of the United States Armed Forces, including the creation and maintenance of permanent American military cemeteries overseas. *See* American Battle Monuments Commission, The Commission, <http://www.abmc.gov/commission/index.php> (last visited March 18, 2009). The Commission currently maintains 24 such cemeteries, which house the remains of over almost 125,000 fallen American servicemen and women. *See* American Battle Monuments Commission, Cemeteries, <http://www.abmc.gov/cemeteries/index.php> (last visited March 18, 2009).

Crosses are a predominant theme throughout these cemeteries. Most notably, of course, are the thousands of cross-shaped headstones. Those crosses are not, however, headstones only for Christian soldiers, but serve as headstones for soldiers from a multitude of religious traditions, and those with no religious affiliation at all: “Each grave is marked with a white marble headstone, a Star of David for those of the Jewish faith, a *Latin cross for all others.*” *See, e.g.,* American Battle Monuments Commission, *Normandy American Cemetery and Memorial*, at 18-19, http://www.abmc.gov/cemeteries/cemeteries/no_pict.pdf (last visited on March 18, 2009) (emphasis added).

The cemeteries incorporate crosses in other ways as well. The Normandy American Cemetery and Memorial in Colleville-sur-Mer, France, for example,

commemorates those who died during the legendary World War II D-Day landings in Normandy. It contains the remains of 9,387 servicemen and women, including three Congressional Medal of Honor recipients and 307 who are Unknowns (those which could not be identified). The grave sites are organized in a rectangular manner, with the main paths “laid out in the form of a Latin cross.” *Id.* at 7. And in the cemetery chapel, the south interior wall bears a Latin cross in relief carved on a circle, directly above the inscription: “THROUGH THE GATE OF DEATH MAY THEY PASS TO THEIR JOYFUL RESURRECTION.” *Id.* at 16.

The Somme American Cemetery and Memorial, in Bony, France, is the final resting place of 1,844 American soldiers, including 138 Unknowns, who died fighting alongside our British allies against Germany during World War I. *See American Battle Monuments Commission, Somme American Cemetery and Memorial*, at 3-6, 9, http://www.abmc.gov/cemeteries/cemeteries/so_pict.pdf (last visited March 18, 2009). Like other cemeteries, the Somme American Cemetery uses white crosses to mark each grave, except for those of known Jewish soldiers – even Unknowns’ graves are marked by crosses. *Id.* at 9. The cemetery’s chapel is illuminated by a window shaped in the form of a cross, and bears an inscription stating: THIS CHAPEL WAS ERECTED BY THE UNITED STATES OF AMERICA IN GRATEFUL REMEMBRANCE OF HER SONS WHO DIED DURING THE WORLD WAR. *Id.* Also inscribed on the chapel walls are the

names of 333 American soldiers missing in the area whose remains were never recovered or identified. *Id.*

Similarly, the St. Mihiel American Cemetery and Memorial, in Thiaucourt, Meurthe-et-Moselle, France, commemorates American soldiers who died during World War I. The cemetery holds 4,153 soldiers, including 117 unknowns. *See American Battle Monuments Commission, St. Mihiel American Cemetery and Memorial*, at 13, http://www.abmc.gov/cemeteries/cemeteries/sm_pict.pdf (last visited March 18, 2009). Each headstone is a cross, except for those of known Jewish soldiers. The cemetery also contains a sculpture of a young American soldier standing in front of a stone cross, with trench helmet in hand, along with his side arms and map case. *Id.* at 9.

In short, the cross is a time-honored display that has long been a powerful symbol of loss, sacrifice, and heroism for generations of Americans – most significantly for those in the Armed Services and their families.

B. Crosses are not exclusively religious symbols, but often carry a “dual significance.”

Appellants present the cross as being exclusively a symbol of Christianity, incapable of communicating any message apart from a distinctly religious one. *See* Brief for Appellants, pp. 21-22. But this overly-narrow view is both nonsensical and inconsistent with the Supreme Court’s Establishment Clause jurisprudence.

The cross unquestionably carries profound religious significance. But the

Supreme Court has long recognized that courts must look to both the religious and secular aspects of a passive display when considering its constitutionality. To do otherwise would predetermine the inquiry's outcome: "Focus[ing] exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch*, 465 U.S. at 680.

The *Van Orden* Court plainly recognized this with regard to the Ten Commandments. "Of course, the Ten Commandments are religious – they were so viewed at their inception and so remain." *Van Orden*, 545 U.S. at 690. But the Court concluded that they also have "an undeniable historical meaning," and that "[s]imply having religious content or promoting a message consistent with religious doctrine does not run afoul of the Establishment Clause." *Id.* (citations omitted); *see also id.* at 701 (Breyer, J., concurring) ("In certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message but also a secular moral message (about proper standards of social conduct). . . . [and] a historical message (about a historic relation between those standards and the law)"); *id.* at 711 (Stevens, J., dissenting) ("[I]t is unsurprising that a religious symbol may at times become an important feature of a familiar landscape or a reminder of an important event in the history of a community.").

Other religious symbols also convey dual secular and religious messages. In *County of Allegheny v. American Civil Liberties Union*, for example, the Supreme

Court explained that the Chanukah menorah “is a religious symbol: it serves to commemorate the miracle of the oil as described in the Talmud. But the menorah’s message is not exclusively religious. The menorah is the primary visual symbol for a holiday that, like Christmas, has both religious and secular dimensions.” 492 U.S. 573, 613-14 (1989).

Crosses, too, convey a multitude of messages – both religious and secular. “The Latin cross is, to be sure, the preeminent symbol of Christianity,” but the District Court correctly concluded that “it does not follow that the cross has no other meaning or significance.” *Trunk*, 568 F. Supp. 2d at 1213; *see also American Atheists, Inc. v. Duncan*, 528 F. Supp. 2d 1245, 1255 (D. Utah 2007) (“It is true that the cross is readily identifiable as a symbol used by Christianity. But it is quite a leap from there to declare that any display of the Latin cross reveals a religious purpose underlying its use.”) (citation omitted).

Examples abound. Most commonly, crosses are used to symbolize death. In *American Atheists*, for example, the court upheld the constitutionality of a state highway patrol association’s practice of erecting memorial crosses at roadside locations where state troopers died or were mortally injured. *Id.* at 1250, 1261-62. It found that, like the Ten Commandments, “the cross possesses a religious origin and retains a religious significance today,” but it also “has dual significance, as demonstrated by America’s long tradition of displaying the cross as a symbol of

death and burial.” *Id.* at 1257.

This tradition is rooted as much in culture as it is in religion. “[C]rosses are overwhelmingly employed in the design of memorials but apparently more as a matter of cultural integration, i.e., a reflex as opposed to an intentional or specific act of faith.” Charles O. Collins & Charles D. Rhine, *Roadside Memorials*, 47 *Omega: Journal of Death and Dying* 221, 229 (2003); *see also* Jennifer Clark & Majella Franzmann, *Authority from Grief, Presence and Place in the Making of Roadside Memorials*, 30 *Death Studies* 579, 591 (2006) (finding that crosses are “general markers of death and sacredness rather than purely Christian symbols”); Sylvia Grider, *Spontaneous Shrines in Public Memorialization, in Death and Religion in a Changing World* 259 (Kathleen Garces-Foley ed., 2005) (noting that the practice of marking fatal car wrecks with roadside crosses is “deeply rooted in history” and an “integral feature of the cultural landscape throughout Central America, Mexico, and the Hispanic southwestern United States”).

Indeed, the Montana American Legion has marked fatal traffic accidents throughout that state with white crosses for more than 55 years – over 2,000 markers have been erected to date. This program is primarily intended to “serve as a public service message, reminding drivers to ‘Please Drive Carefully.’ They are a sobering reminder of a fatal traffic accident, a place where a human being lost his/her life.” *See Highway Fatality Marker Safety Program*,

<http://www.mtleion.org/programs/Marker.php> (last visited March 16, 2009).

Crosses are used to communicate other secular messages as well. The military uses the cross as a symbol honoring extreme gallantry and heroism in decorations such as the Distinguished Service Cross (10 U.S.C. § 3742), the Navy Cross (10 U.S.C. § 6242), the Air Force Cross (10 U.S.C. § 8742), and the Distinguished Flying Cross (10 U.S.C. § 3749). Indeed, as one historian explained, the cross is an “emblem for valor and bravery,” and “[f]rom the time of the Crusades until the last great war, decorations for chivalry and for distinguished service have been made in the form of a cross.” George Willard Benson, *The Cross: Its History and Symbolism* 57 (1934).

The Ku Klux Klan uses crosses as “a symbol of white supremacy and a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and other groups hated by the Klan.” *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (Thomas, J., concurring). “The erection of such a cross is a political act, not a Christian one.” *Id.*

Crosses have even been used to simply identify the name of a city. In *Weinbaum v. City of Las Cruces*, the Tenth Circuit upheld a city’s use of crosses in its city emblem because the crosses’ symbolic message – reflecting the name of the city, Las Cruces, which means “The Crosses” – “is not religious at all.” 541 F.3d 1017, 1035 (10th Cir. 2008); *see also id.* at 1023 & n.2 (the Latin cross “is

unequivocally a symbol of Christian faith . . . [b]ut is not exclusively so; the cross is an oft-used symbol in other cultures and religions as well”) (citing 5 *Encyclopedia of Religion* 3434 (Lindsay Jones ed., 2005); 14 *Encyclopedia of Religion* at 9339).

The Mt. Soledad cross, too, conveys a secular message. Like other veteran memorials and cemeteries, it serves as a universal symbol honoring and memorializing those who have paid the ultimate sacrifice for their fellow citizens and country, irrespective of religious belief. It also serves as a rallying point for survivors and others to remember their sacrifice and find solace, peace, and reason for such loss. The cross carries a dual significance in that it is a uniquely transcendent symbol representing the decision to lay down one’s life for the good of others. “[T]he cross is an emblem more universal in use than any other in the world.” Benson, *supra*, at 61. Indeed, no other symbol is so universally understood to represent selfless service and sacrifice for others, including the ultimate sacrifice of laying down one’s life for others.

II. Justice Breyer also rejected the *Lemon* test and would affirm the constitutionality of this passive religious monument.

Justice Breyer, whose concurring opinion was the fifth vote upholding the constitutionality of the display in *Van Orden*, also refused to strictly apply the *Lemon* test. “I rely less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment’s Religion Clauses

themselves.” *Van Orden*, 545 U.S. at 703-04 (Breyer, J., concurring). Like Chief Justice Rehnquist, Justice Breyer emphasized the historical significance of the monument rather than whether the government officials had a religious purpose or motive in allowing it to be erected. “The setting does not readily lend itself to meditation or any other religious activity. But it does provide a context of history and moral ideals. It (together with the display’s inscription about its origin) communicates to visitors that the State sought to reflect moral principles, illustrating a relation between ethics and law that the State’s citizens, historically speaking, have endorsed.” *Id.* at 702.

Likewise, the Mt. Soledad memorial provides a context of history and respect for the sacrifice of the fallen members of our armed services. Whether one studies the more than 2,400 granite plaques displayed on the walls surrounding the memorial, surveys the 23 bollards honoring community and veterans organizations, walks over the inscribed brick paving stones commemorating veterans and supporters, looks upon the American flag flying above the memorial, or reads the bronze plaque on the cross identifying it as a veterans memorial, the singular message is unmistakable: this memorial is a tribute to the members of the United States Armed Forces who sacrificed their lives in the defense of their country. *See* Pub. L. No. 109-272, §1(1), 120 Stat. 770 (2006).

Justice Breyer also found it “determinative” that the Texas monument had

been in place for forty years and was unchallenged apart from this single case. *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring). The Mt. Soledad cross has been part of the Veterans Memorial for over *fifty* years. Removing it after such an extended time due to its religious symbolism may actually reflect hostility to religion in violation of the Establishment Clause. As Justice Breyer aptly observed:

At the same time, to reach a contrary conclusion here, based primarily upon on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.

Id. at 704 (citation omitted).

Justice Breyer's concern for social division is even more acute in the context of a veterans memorial. If the Court orders the bulldozing of the cross – the centerpiece of the Mt. Soledad Veterans Memorial – it will send a message of stark social division, forever banning religious imagery from being invoked to honor the sacrifice of our fallen brothers, sisters, fathers, mothers, daughters, and sons.

Appellants fault the district court for failing to scrutinize the “motivation” of the Mt. Soledad Memorial Association³ and attributing that motive to the government, suggesting that Justice Breyer's opinion in *Van Orden* requires such

³ The Mt. Soledad Memorial Association erected the existing cross in 1954 and currently maintains the property as a veterans memorial. *Trunk*, 568 F. Supp. 2d at 1203-04.

an inquiry. *See* Brief for Appellants, pp. 51-52.

This argument is foreclosed by *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009) – an opinion in which Justice Breyer joined. The Court explained that a government entity that accepts a privately donated monument “does not necessarily endorse the specific meaning that any particular donor sees in the monument.” *Id.* at 1136. The government entity may actually want to convey a message that is “quite different from those of either its creator or its donor.” *Id.* In fact, the Court recognized, the message conveyed by a monument “may change over time” – and the Court used war memorials as a specific example of how people “reinterpret” the meaning of monuments as society and history changes. *Id.* (quoting James M. Mayo, *War Memorials as Political Landscape: The American Experience and Beyond* 8-9 (1988)). Thus, it is impossible to impose a private organization’s motives for erecting a monument on the government’s decision to permit it. The Appellants’ suggestion otherwise is wholly improper. *See also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994) (“[W]e do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution.”); *Card*, 520 F.3d at 1020 (under *Van Orden*, the “City’s intent is the key . . . and [this Court] will not infer a non-secular purpose.”).

CONCLUSION

For more than two hundred and twenty-five years, millions of Americans have sacrificed their lives for their country. Their memory will long endure, etched in granite and marble, chiseled with a permanence that echoes their valiant lives. Each man and woman who fought our Nation's wars and gave their lives in service is remembered in local, state, and national war memorials. This includes those unknown soldiers who find their only recognition in the Tomb of the Unknowns, forever solemnly guarded and honored with a simple inscription capturing their lives and their deaths – “Here Rests In Honored Glory An American Soldier Known But to God.”⁴

The nature of armed combat for the survival of our civilization and national heritage requires us to search within ourselves and our culture to identify the common threads that bind us together, not seek to create social division by tearing down the memorials that stand for the sacrificial contributions of countless veterans and their families. *See Eugene Sand & Gravel, Inc. v. City of Eugene*, 276 Or. 1007, 1022 (1976) (“[A] monument with a cross is an appropriate symbol of sacrifice by men who gave their lives for their country in time of war.”).

It is disheartening and distressing to think that Arlington National Cemetery,

⁴ The U.S. Army Military District of Washington, *Tomb of the Unknowns*, <http://www.army.mil/oldguard/core/specplt/tomb.htm> (last visited March 16, 2009).

and America's other military burial grounds around the globe, may be gutted because there are those who ignore the unique way the cross has universally honored the choice our soldiers made to lay down their lives for the good of the rest of us. If we cannot publicly acknowledge this Nation's religious history and heritage to honor those who have made the ultimate sacrifice, how can we as a Nation ever look into the face of youth to call upon it to once again return to the altar of freedom and offer the same sacrifice given by generations before?

No memorial, however brilliantly conceived, can represent the sentiments of all those it means to serve. But the Establishment Clause should not be misused as a tool to reduce such sentiments to the lowest common denominator of sadness and gloom. Memorials exist not just to convey that the youth perished, end of story. Most people crave more than that; they crave the eternal hope that those who perished did so for something greater than themselves.

Dated: March 24, 2009

Respectfully submitted,

/s/Timothy D. Chandler

Timothy D. Chandler

ALLIANCE DEFENSE FUND

Attorney for Amicus Curiae

The American Legion Department of California

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, this amicus brief is proportionally spaced, has a typeface of 14 points, and contains 7000 words or less.

Dated: March 24, 2009

/s/Timothy D. Chandler
Timothy D. Chandler
ALLIANCE DEFENSE FUND
Attorney for Amicus Curiae
The American Legion Department of California

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in this case are not registered CM/ECF users. The foregoing document was mailed, by First Class Mail, postage pre-paid, to the following non-CM/ECF users:

A. Stephen Hut, Jr. <i>Wilmer Cutler Pickering Hale & Dorr LLP</i> 1875 Pennsylvania Avenue, N.W. Washington, DC 20006	<i>Attorney for Jewish War Veterans</i> <i>Appellants</i>
George F. Schaefer <i>Law Offices of George F. Schaefer</i> 1200 Third Street, Suite 1100 San Diego, California 92101	<i>Attorney for City of San Diego</i> <i>Appellee</i>
David Negri <i>Office of the U.S. Attorney</i> 800 Park Boulevard, Suite 600 MK Plaza, Plaza IV Boise, Idaho 83712	<i>Attorney for U.S.A.</i> <i>Appellees</i>
Peter McVeigh <i>United States Department of Justice</i> <i>Environment & Natural Resources Division</i> P.O. Box 4390, Ben Franklin Station Washington, DC 20044	<i>Attorney for U.S.A. and</i> <i>Robert M. Gates</i> <i>Appellees</i>

<p>Ryan D. Nelson <i>United States Department of Justice Environment & Natural Resources Division</i> P.O. Box 663 Washington, DC 20044</p>	<p><i>Attorney for U.S.A. and Robert M. Gates Appellees</i></p>
<p>Ayesha N. Khan <i>Americans United for Separation of Church & State</i> 518 C. Street, NE Washington, DC 20002</p>	<p><i>Attorney for Americans United for Separation of Church and State Amicus Curiae</i></p>
<p>Shelley J. Klein 50 West 58th Street New York, New York 10019</p>	<p><i>Attorney for Hadassah, The Women's Zionist Organization of America, Inc. Amicus Curiae</i></p>
<p>Pedro L. Irigonegaray 1535 SW 29th Street Topeka, Kansas 66611</p>	<p><i>Attorney for Military Religious Freedom Foundation Amicus Curiae</i></p>

/s/Timothy D. Chandler
 Timothy D. Chandler