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10 behalf of her deceased husband Maj. Gerald M. Bloomfield, II, USMC*

11 **UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

12 STEVEN TRUNK and PHILIP K.  
PAULSON,

13 Plaintiffs,

14 v.

15 CITY OF SAN DIEGO; THE UNITED  
STATES OF AMERICA, et al.,

16 Defendants,

17 MOUNT SOLEDAD MEMORIAL  
ASSOCIATION,

18 Real parties in interest.

19  
20 JEWISH WAR VETERANS OF THE  
UNITED STATES OF AMERICA, INC.;  
21 RICHARD A. SMITH; MINA SAGHEB;  
and JUDITH M. COPELAND,

22 Plaintiffs,

23 v.

24 ROBERT M. GATES, Secretary of Defense,  
in his official capacity,

25 Defendant.

Case No. 06-CV-1597 LAB (WMC)  
(consolidated with 06-CV-1728)

**BRIEF OF AMICI CURIAE SYBIL  
MARTINO and ROBERT  
MARTINO, individually and on  
behalf of their deceased son MAJ.  
MICHAEL D. MARTINO, USMC;  
JULIE BLOOMFIELD,  
individually and on behalf of her  
deceased husband MAJ. GERALD  
M. BLOOMFIELD, II, USMC**

Hon. Larry Alan Burns

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1 **INTRODUCTION**

2 The purpose of this brief is to provide a voice in this Court that is not often heard. It is  
3 the voice of those who will be harmed in a *real* way by the destruction of the veterans'  
4 memorial. Make no mistake about it, dismantling the cross *will* destroy the memorial.

5 *Amici Curiae* Sybil and Robert Martino are the parents of then Captain Michael D.  
6 Martino, USMC, and *Amicus Curiae* Julie Bloomfield is the wife of Major Gerald M.  
7 Bloomfield, II, USMC. Both Captain Martino and Major Bloomfield were Marine pilots who  
8 flew the AH-1 W Super Cobra attack helicopter. On November 2, 2005, while flying in support  
9 of security operations near Ar Ramadi, Iraq as part of Operation Iraqi Freedom, their helicopter  
10 was shot down by a surface-to-air missile. Both Marines were killed. Captain Martino was  
11 posthumously promoted to major.<sup>1</sup>

12 Consistent with its use as a war memorial, regular activities are conducted at the Mt.  
13 Soledad memorial site commemorating veterans. In May 2006, for example, after returning  
14 from deployment in Iraq, Captain Martino's and Major Bloomfield's Camp Pendleton squadron  
15 sponsored a plaque dedication ceremony at the Mt. Soledad memorial to commemorate the  
16 fallen Marines' heroic service and to provide a place to honor them.<sup>2</sup> This was not a religious  
17 service. Over three hundred Marines stood in line in the hot sun for over three hours to meet  
18 the Martino and Bloomfield families and to pay respect for their fallen comrades. The emotions  
19 felt by the families and the Marines present at this ceremony were inexplicable. The dedication  
20 of those plaques at the foot of the memorial cross overlooking the country that these Marines

21 \_\_\_\_\_  
22 <sup>1</sup> For purposes of this brief, the relevant facts are set forth in the Declaration of Sybil Martino  
23 ("Martino Decl."), attached as Exhibit A.

24 <sup>2</sup> Photographs of the Martino and Bloomfield plaques as well as photographs of the service at  
25 the memorial site are attached to the Martino Decl. as Exhibits 2 through 6. No reasonable  
observer could conclude that the Mt. Soledad Veterans' Memorial is anything but a war  
memorial dedicated to honoring the memories of our Nation's fallen veterans.

1 fought and died to protect provided comfort, solace, and closure for the Marines and the  
2 grieving families. Both Martino and Bloomfield were buried with military honors at Arlington  
3 National Cemetery.<sup>3</sup>

4 The Martino and Bloomfield families, like so many other families during time of war,  
5 have sacrificed much for this country, giving their most precious gifts—their sons, brothers, and  
6 husbands. The families were most heartened in those somber days after the squadron returned  
7 home from Iraq without their loved ones to know that their memories were preserved under the  
8 cross at Mt. Soledad. To strip this symbol from the memorial as Plaintiffs' desire here would  
9 uselessly, needlessly, and painfully desecrate these memories.

10 Whatever contrived harm that Plaintiffs will "feel" if the war memorial remains intact  
11 pales in comparison to the real and lasting harm that dismantling this memorial will have to the  
12 families and to the memories of those fallen heroes who are honored by the memorial.

13 For most *reasonable* American citizens, and particularly those whose sons, daughters,  
14 husbands, and wives have died defending this country, specifically including *Amici Curiae*, the  
15 Mt. Soledad Veterans' Memorial is a lasting tribute to our servicemen and servicewomen. It  
16 does not "establish" Christianity as a national religion, as Plaintiffs contend.

17 From time immemorial, crosses have been used to memorialize fallen war veterans. A  
18 cross in the context of a war memorial has an undeniable historical meaning of self-sacrifice—  
19 in particular, of making the ultimate sacrifice for one's country.

20 Like most war memorials, the Mt. Soledad Veterans' Memorial provides a place where  
21 family members, friends, and comrades of our fallen war veterans can pay tribute to their  
22

23  
24  
25 <sup>3</sup> Photographs of the funeral of Major Martino held at Arlington National Cemetery are attached  
to the Martino Decl. as Exhibits 7 through 17. Note the cross on the gravestone of Major  
Martino, *see* Ex. 16, and the crosses on the gravestones of the many other fallen veterans, *see*  
Exs. 8, 9, 10, 13, 15, 16, 17. All of these crosses are displayed on federal property.

1 heroes' sacrifices. It is fitting that this memorial is in the shadow of a cross—a universal  
2 symbol of sacrifice.

3 Beginning in 2000, the Mt. Soledad Memorial Association (a private organization) made  
4 substantial improvements to the veterans' memorial. The memorial cross is not a stand-alone  
5 symbol. Rather, six large, concentric granite walls surround the cross. The walls are adorned  
6 with plaques honoring individual veterans—each plaque tells the story of the veteran's service  
7 to our Nation. Some of the plaques contain Stars of David, honoring Jewish veterans.  
8 Currently, there are approximately 2,100 plaques honoring individuals or groups of veterans,  
9 and the total number continues to grow. The veterans' memorial also includes 23 bollards (*i.e.*,  
10 small pillars) and brick pavers honoring community and veterans groups and supporters of the  
11 memorial. Additionally, the memorial features a tall flagpole and a large American flag.

12 In a letter dated May 22, 2001, from President George W. Bush to the Mt. Soledad  
13 Memorial Association, the President stated, "Mount Soledad becomes a place to reflect on our  
14 past, be inspired by true American patriots, and offer war veterans our heartfelt gratitude for the  
15 freedom we all enjoy today." (*See Ex. B*). *Amici Curiae* can attest to the truth of this statement  
16 on a very personal level.

### 17 ARGUMENT

#### 18 **DISMANTLING THE VETERANS' MEMORIAL WOULD CAUSE IRREPARABLE** 19 **HARM PROHIBITED BY THE ESTABLISHMENT CLAUSE.**

20 Plaintiffs would have this Court completely ignore the interests of *Amici Curiae* and the  
21 countless other family members, friends, and comrades of our fallen veterans who will be  
22 significantly and irreparably harmed should this Court adopt Plaintiffs' erroneous and divisive  
23 view of our Constitution. *Amici Curiae* strongly urge this Court to view the attached  
24 photograph of Mrs. Martino hugging the casket of her son at the conclusion of the funeral  
25 service held on *federal* land by *federal* agents at Arlington National Cemetery. (*See Ex. 14*).

1 The memory of her son is now preserved at the Mt. Soledad Veterans' Memorial—a memory  
2 that Plaintiffs seek to destroy in this lawsuit.

3 In *Van Orden v. Perry*, 545 U.S. 677 (2005), a case in which a plurality of justices  
4 upheld the 40-year display of the Ten Commandments on the grounds of the Texas State  
5 Capitol, the Supreme Court rejected arguments advanced by Plaintiffs in this case. Most  
6 significantly, Justice Breyer, in his concurring opinion, which provided the narrowest grounds  
7 for the decision, stated,

8 [The removal of the religious symbol], based primarily on the religious nature of  
9 the tablets' text would, I fear, lead the law to exhibit a hostility toward religion  
10 that has no place in our Establishment Clause traditions. Such a holding might  
11 well encourage disputes concerning the removal of longstanding depictions of the  
12 Ten Commandments from public buildings across the Nation. And it could  
13 thereby create the very kind of religiously based divisiveness that the  
14 Establishment Clause seeks to avoid.

15 *Id.* at 704.

16 Here, Plaintiffs seek to foment “religiously based divisiveness” contrary to the neutrality  
17 and accommodation principles required by our Constitution.

18 From at least 1789, there has been an unbroken history of official acknowledgment by  
19 all three branches of government of religion's role in American life. *Id.* at 686-87 (citing *Lynch*  
20 *v. Donnelly*, 465 U.S. 668, 674 (1984)). Examples of this historical acknowledgment include  
21 Executive Orders recognizing religiously grounded national holidays, such as Christmas and  
22 Thanksgiving, Congress directing the President to proclaim a National Day of Prayer each year,  
23 the printing on our currency of the national motto, “In God We Trust,” the display of the crèche  
24 during Christmas, and representations of the Ten Commandments on government property. *See*  
25 *Lynch*, 465 U.S. at 675-77, 686, *Van Orden*, 545 U.S. at 677; *see also Marsh v. Chambers*, 463  
U.S. 783 (1983) (upholding legislative prayer).

In *Lynch*, the Supreme Court stated,

One cannot look at even this brief resume [of historical examples] without  
finding that our history is pervaded by expressions of religious beliefs. . . .

1 Equally pervasive is the evidence of accommodation of all faiths and all forms  
2 of religious expression and hostility toward none. Through this  
3 accommodation, as Justice Douglas observed, governmental action has  
4 “follow[ed] the best of our traditions” and “respect[ed] the religious nature of  
5 our people.” [*Zorach v. Clauson*, 343 U.S. 306, 314 (1952)].

4 465 U.S. at 677-78.

5 As recently noted by the Supreme Court, “Recognition of the role of God in our  
6 Nation’s heritage has also been reflected in our decisions. We have acknowledged, for  
7 example, that religion has been closely identified with our history and government, and that the  
8 history of man is inseparable from the history of religion.” *Van Orden*, 545 U.S. at 687  
9 (internal quotations and citations omitted); *see also Elk Grove Unified Sch. Dist. v. Newdow*,  
10 542 U.S. 1, 26 (2004) (Rehnquist, C.J., concurring in judgment) (“Examples of patriotic  
11 invocations of God and official acknowledgments of religion’s role in our Nation’s history  
12 abound.”); *id.* at 35-36 (O’Connor, J., concurring in the judgment) (“It is unsurprising that a  
13 Nation founded by religious refugees and dedicated to religious freedom should find references  
14 to divinity in its symbols, songs, mottoes, and oaths.”).

15 The use of religious symbols has long been a part of government and remains so today.  
16 *See, e.g., Van Orden*, 545 U.S. at 688 (acknowledging “the role played by the Ten  
17 Commandments in our Nation’s heritage”). Attempts to suppress this recognition and historical  
18 acknowledgment—as Plaintiffs seek here—are the antithesis of the value of religious tolerance  
19 that underlies the Establishment Clause. *See, e.g., Lamb’s Chapel v. Center Moriches Union*  
20 *Free Sch. Dist.*, 508 U.S. 384, 400 (1993) (Scalia, J., concurring in the judgment) (“What a  
21 strange notion, that a Constitution which itself gives ‘religion in general’ preferential treatment  
22 (I refer to the Free Exercise Clause) forbids endorsement of religion in general.”).

23 Thus, while the use of religious symbols is a permissible way to acknowledge our  
24 Nation’s rich religious heritage, decisions that are hostile toward religion do not enjoy such a  
25 favorable history. *See Lynch*, 465 U.S. at 673 (stating that the Constitution “forbids hostility



1 toward any” religion) (internal punctuation, quotations, and citations omitted); *Church of the*  
2 *Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (“[T]he First  
3 Amendment forbids an official purpose to disapprove of a particular religion or of religion in  
4 general.”).

5       Accordingly, in this case a reasonable and informed observer would know that the  
6 veterans’ memorial was built and is maintained by the Mt. Soledad Memorial Association, a  
7 private organization. A reasonable observer would see that the cross is but one component of  
8 an impressive veterans’ memorial, not merely a stand-alone religious symbol. A reasonable  
9 observer would know that while the cross is a religious symbol, it is also a universal symbol of  
10 self-sacrifice—and in the context of a war veterans’ memorial, the cross is a symbol of the  
11 ultimate sacrifice made for one’s country. The reasonable observer would know that crosses  
12 are frequently used to memorialize fallen warriors, and not only on individual graves. For  
13 example, large memorial crosses are displayed on federal property at Arlington National  
14 Cemetery (the Argonne Memorial and Canadian Cross of Sacrifice) and Gettysburg National  
15 Military Park (Irish Brigade Monument), and municipal property at the Taos Plaza (a cross  
16 memorializing soldiers of the Bataan Death March of World War II). A reasonable observer  
17 would know that, historically, the cross has been used as a generic grave marker for fallen  
18 soldiers, even when the religious beliefs of the individual honored by the cross were unknown.  
19 For example, it is commonly known that there are thousands of crosses marking the gravesites  
20 of fallen United States soldiers at places such as Flanders Field in the Netherlands (World War  
21 I) and Normandy, France (World War II). Likewise here, the observer would know that many  
22 family members, friends, and comrades of our fallen veterans have chosen to honor their heroes  
23 and remember their sacrifices by placing individual plaques in the shadow of the historic Mt.  
24 Soledad cross. *See, e.g., American Atheists, Inc. v. Duncan*, No. 2:05CV00994 DS, 2007 WL  
25 4166045, at \*10 (D. Utah Nov. 20, 2007) (“While the cross retains its religious meaning when

1 placed in religious contexts, it has transformed into a representation of death and burial . . .  
2 when used as a memorial.”).

3 Plainly, the Mt. Soledad Veterans’ Memorial is a world-class veterans’ memorial  
4 dedicated to honoring our Nation’s veterans; it provides a place of comfort and solace to the  
5 many family members, friends, and comrades of our fallen heroes. Thus, a reasonable observer  
6 would conclude that this memorial is not about religion; it is about remembering our veterans  
7 who have sacrificed for this country.

8 In the final analysis, the memorial cross, in its present physical setting, does not convey  
9 an impermissible message of endorsement of religion. Rather, this memorial conveys an  
10 unmistakably American message of patriotism and self-sacrifice. To dismantle this historic  
11 memorial would desecrate the memories of our fallen war veterans and cause incalculable harm  
12 to the families, friends, and comrades of these veterans, including *Amici Curiae*. Thus, this  
13 Court should reject Plaintiffs’ misguided efforts to destroy a national landmark and treasure  
14 based on their flawed view of the Constitution. The harm that will be caused by accepting  
15 Plaintiffs’ view is real and palpable.

16 **CONCLUSION**

17 For the foregoing reasons, this Court should deny Plaintiffs’ motions for summary  
18 judgment and grant judgment in favor of Defendants on all claims.

19 Respectfully submitted this 19<sup>th</sup> day of December, 2007.

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10 *of their deceased son Maj. Michael D. Martino, USMC, Julie Bloomfield, individually*  
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11 *Diegans for the Mt. Soledad National War Memorial*

12 **UNITED STATES DISTRICT COURT**  
13 **SOUTHERN DISTRICT OF CALIFORNIA**

14 STEVE TRUNK and PHILIP K.  
15 PAULSON,  
16  
17 Plaintiffs,  
18 v.

CASE NO. 06cv1597 BTM (Wmc)  
(Consolidated with 06cv1728)

17 CITY OF SAN DIEGO, UNITED STATES  
18 OF AMERICA, DONALD H.  
RUMSFELD, Secretary of Defense, and  
19 DOES 1 through 100, Inclusive,  
20  
21 Defendants.

**CERTIFICATE OF SERVICE**

Judge: Hon. Larry Alan Burns

20 MOUNT SOLEDAD MEMORIAL  
21 ASSOCIATION, Real parties in interest.

22  
23 JEWISH WAR VETERANS OF THE  
24 UNDATED STATES OF AMERICA, INC.,  
RICHARD A. SMITH, MINA SAGHEB,  
and JUDITH M. COPELAND,  
25  
26 Plaintiffs,

26 v.  
27 ROBERT M. GATES, Secretary of  
28 Defense, in his official capacity,  
Defendant.

**CERTIFICATE OF SERVICE**

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years and not a party to this action; my business address is P.O. Box 9120, Rancho Santa Fe, California 92067, and that I served the following document(s):

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16 ■ **BY MAIL - as follows:** I am "readily familiar" with the firm's practice of  
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21 on the interested parties in this action by placing a true copy in a sealed envelope,  
addressed as follows:

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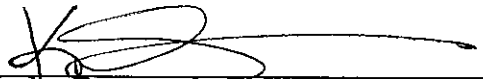
5 I declare under penalty of perjury, under the laws of the State of California, that  
6 the above is true and correct.

7

Executed on December 20, 2007, at Rancho Santa Fe, California.

8

9

  
Kathy Denworth, Declarant

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