

Nos. 13-57126 & 14-55231

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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STEVE TRUNK, ET AL,  
*Plaintiffs-Appellees,*

v.

CITY OF SAN DIEGO, UNITED STATES OF AMERICA, AND CHUCK HAGEL,  
SECRETARY OF DEFENSE  
*Defendants-Appellants,*

and

MT. SOLEDAD MEMORIAL ASSOCIATION,  
*Defendant-Appellant.*

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Appeal from the United States District Court  
for the Southern District of California  
Case Nos. 06-cv-1597-LAB & 06-cv-1728-LAB  
Hon. Larry A. Burns

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**BRIEF OF MILITARY HISTORIANS AS *AMICI CURIAE*  
IN SUPPORT OF APPELLEES**

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## **AUTHORSHIP AND MONETARY CONTRIBUTION STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *Amici Curiae* Military Historians state that no counsel for any party authored this brief in whole or in part; no party or counsel for any party contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amici curiae* and their counsel contributed money that was intended to fund preparing or submitting the brief.

**TABLE OF CONTENTS**

	<b>Page</b>
AUTHORSHIP AND MONETARY CONTRIBUTION STATEMENT .....	i
TABLE OF AUTHORITIES.....	iii
STATEMENT OF INTEREST OF THE AMICI CURIAE .....	vii
INTRODUCTION .....	1
ARGUMENT .....	3
I. The Latin Cross Is A Powerful Sectarian Christian Symbol That The Military Has Avoided Using To Memorialize Non- Christian Soldiers.....	3
A. The Latin cross is the preeminent symbol of Christianity and is featured in many Christian burial ceremonies. ....	3
B. During the World Wars, when the military used the Latin cross to mark the graves of individual Christian soldiers on foreign soil, it used the Star of David to mark the graves of Jewish soldiers. ....	6
C. The military took a variety of measures to avoid inadvertently burying non-Christian soldiers under the Latin cross. ....	12
D. The Latin cross is but one of many emblems of belief on soldiers’ gravestones. ....	17
II. The Latin Cross Has Not Developed A Secular, Secondary Meaning Through Its Use In Monuments.....	20
A. Prominent war monuments avoid the Latin cross.....	21
B. Few memorials include crosses, even fewer include Latin crosses.....	24
CONCLUSION.....	31

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Federal Cases</b>	
<i>Carpenter v. City &amp; Cnty. of San Francisco</i> , 93 F.3d 627 (9th Cir. 1996) .....	6
<i>Cnty. of Allegheny v. ACLU</i> , 492 U.S. 573 (1989) .....	29
<i>Warner v. City of Boca Raton</i> , 64 F. Supp. 2d 1272 (S.D. Fla. 1999) .....	5
<b>Other Authorities</b>	
Arlington National Cemetery, <i>Canadian Cross of Sacrifice</i> , <a href="http://tinyurl.com/p5tww74">http://tinyurl.com/p5tww74</a> .....	29
Arlington National Cemetery, <i>The Tomb of the Unknown Soldier</i> , <a href="http://tinyurl.com/l9urtrn">http://tinyurl.com/l9urtrn</a> .....	22
Lisa Budreau, <i>Bodies of War: World War I and the Politics of Commemoration in America, 1919-1933</i> (2010) .....	7, 8, 9, 16
<i>The Catholic Encyclopedia</i> (Charles G. Herbermann et al. eds., 1913) .....	5, 6
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Dep’t of the Navy—Navy Historical Center, <i>Personal Identification Tags</i> , <a href="http://www.history.navy.mil/faqs/faq70-1.htm">http://www.history.navy.mil/faqs/faq70- 1.htm</a> .....	13
William K. Emerson, <i>Encyclopedia of United States Army Insignia and Uniforms</i> (1996) .....	8
<i>Encyclopedia of the American Civil War: A Political, Social, and Military History</i> (David S. Heilder et al, eds. 2000) .....	28

Paul Feine, *Theologie Des Neuen Testaments* (1910) .....4

Minucius Felix, *Octavius* (160-250 A.D.), available at  
<http://tinyurl.com/nyvmq9m> .....4

Gallop, *Religion*, <http://tinyurl.com/28ofr4x>.....12

Gettysburg Foundation, *Battlefield Monuments*,  
<http://www.gettysburgfoundation.org/17/gettysburg-monuments> .....28

Michael Hilton, *The Shadow of the Cross*, available at  
<http://tinyurl.com/k47nqz4> .....16, 17

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Jehovah’s Witnesses, *Why True Christians Do Not Use the Cross in Worship*, <http://tinyurl.com/mtj5r4s>.....11

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<http://www.jewishencyclopedia.com/articles/4776-cross> .....4

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<http://www.koreanwarvetsememorial.org/memorial?from=national>.....23

Emma McVeigh, *Neither Irish nor British: The Identities of Sculpture in Northern Ireland, 1921-1951*, 21 *Sculpture J.* 145 (2012).....27

National Park Service, *US Marine Corps War Memorial*,  
<http://tinyurl.com/o9gt6z4>.....23

National Park Service, *Vietnam Veterans*,  
[www.nps.gov/vive/index.htm](http://www.nps.gov/vive/index.htm) .....23

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[www.nps.gov/wwii/historyculture/index.htm](http://www.nps.gov/wwii/historyculture/index.htm).....22

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 (1943).....14

G. Kurt Piehler, *Remembering War the American Way* (1995) .....9, 15, 21

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Smithsonian American Art Museum, *National Art Inventories*,  
<http://americanart.si.edu/research/programs/inventory/> .....24

Archpriest Victor Sokolov, *Death, Funeral, Requiem—  
 Orthodox Christian Traditions, Customs, and Practice*,  
*available at* <http://tinyurl.com/7zdd4x7> .....6

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 (2005).....5

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 Markers*, [www.cem.va.gov/hmm/emblems.asp](http://www.cem.va.gov/hmm/emblems.asp) .....17, 20

U.S. Department of Veterans Affairs, *Pre-World War I Era  
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*available at* <http://tinyurl.com/q2oq3ot>.....5

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Benjamin B. Warfield, *The Essence of Christianity and the Cross of Christ*, 7 Harv. Theol. Rev. 538 (1914) ..... 3-4

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**STATEMENT OF INTEREST OF THE *AMICI CURIAE*<sup>1</sup>**

*Amici* are scholars of American military history with an interest in ensuring that the Court is fully informed about the history and context of American war memorials and the significance of the use of the Latin cross in such a memorial. This brief is joined by the following military historians (affiliations are for identification only):

John Bodnar is the Distinguished and Chancellor's Professor, Department of History, and the Co-Director of the Center for Study of History and Memory at Indiana University. Professor Bodnar's research focuses on twentieth-century America and issues of war and memory.

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<sup>1</sup> All parties consent to the filing of this brief.



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## INTRODUCTION

The Latin cross is the preeminent symbol of Christianity. It marks Christian churches and Christian graves. The cross is worn around the necks of many faithful Christian believers. It also adorns the walls of many Christian homes. And it does so because of the fundamental association between the Latin cross and Christ: Representing Christ's suffering and his triumph over death, the cross inspires in Christians the love of Jesus and the promise of redemption.

Despite this powerful religious symbolism, the government contends that the military has divorced the Latin cross from Christianity. In the government's view, because the military has used the Latin cross to mark Christian soldiers' graves during the World Wars, the Latin cross has acquired a secondary meaning as a universal secular symbol honoring all veterans. But this argument cannot be squared with how the military itself has used the Latin cross and how non-Christians view its use.

The military has long understood that the Latin cross is not a secular symbol. When the military displayed the Latin cross as a grave marker during the World Wars, it used it as a Christian symbol to memorialize Christian soldiers. Recognizing that it was invoking the

Latin cross's deep Christian meaning, the military took care not to mark the graves of Jewish soldiers with the cross. In permanent cemeteries, the military used the Star of David—a symbol of the Jewish faith—to mark Jewish soldiers' graves. Even on the battlefield, the military used a variety of non-Christian symbols to mark the graves of soldiers who were not Christian. As the military became more and more diverse, the symbols used to commemorate military death multiplied. Today, the military properly views the Latin cross as just one of more than sixty emblems of belief that it inscribes on deceased soldiers' headstones.

The military's use of the Latin cross as a Christian grave marker for Christian soldiers has not somehow transformed it into a universal secular symbol honoring all military dead. It is no accident that the prominent national monuments and memorials that honor our war dead avoid the Latin cross in favor of evocative secular images to which all can relate. The military has consistently recognized that the Latin cross—the symbol of Jesus's crucifixion—is a distinctly Christian symbol that honors only individual Christian soldiers. For the same reasons, the government cannot divorce the Mt. Soledad memorial from its religious symbolism.

## ARGUMENT

### **I. The Latin Cross Is A Powerful Sectarian Christian Symbol That The Military Has Avoided Using To Memorialize Non-Christian Soldiers.**

Consistent with the Latin cross's deep religious meaning and usage, the military has continuously recognized that the Latin cross is a Christian symbol and that non-Christians attribute no secular meaning to it. The military recognized this when it marked Christian soldiers' graves with a Latin cross and Jewish soldiers' graves with a Star of David. It continued that recognition when it responded to increasing religious diversity by expanding the number of emblems of belief it inscribes on headstones—today the Latin cross is just one of more than sixty emblems of belief. And tellingly, the government has provided no evidence establishing that non-Christian soldiers voluntarily sought or seek burial beneath the Latin cross.

#### **A. The Latin cross is the preeminent symbol of Christianity and is featured in many Christian burial ceremonies.**

Almost since the crucifixion and death of Christ on the cross, the cross has been the preeminent symbol of Christianity. Indeed, in the second century Christian believers “had to defend themselves ... against

the charge of being worshipers of the cross.”<sup>2</sup> In modern times, for many Christians and non-Christians alike, the cross has only become a more prominent and powerful religious symbol. The “symbol of [Christian] belief greets us in the form of the Cross from the tower of every church, from every Christian grave-stone and in the thousands of forms in which the Cross finds employment in daily life ....” Benjamin B. Warfield, *The Essence of Christianity and the Cross of Christ*, 7 Harv. Theol. Rev. 538, 592 (1914) (quoting Paul Feine, *Theologie Des Neuen Testaments* 120 (1910)).

The Latin cross’s symbolic power follows directly from “the belief and the teaching of the Christian Church of all ages and of all Confessions, that Jesus, the Son of God, in His sacrificial death on the cross wrought the reconciliation of men with God, and by His resurrection begot anew those who believe in Him unto a living hope of eternal life.” *Id.* In other words, the cross demonstrates the path to atonement, the pardoning of man’s sin through the death and resurrection of Jesus. It memorializes Jesus’s “triumph[] over them by the cross.” Colossians 2:15

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<sup>2</sup> *The Jewish Encyclopedia: Cross* (Funk & Wagnalls Co. 1906), available at <http://www.jewishencyclopedia.com/articles/4776-cross>, citing Minucius Felix, *Octavius* (160-250 A.D.), available at <http://tinyurl.com/nyvmq9m>.

(New International). For Catholics, specifically, the Latin cross “is a reminder of Christ’s paschal mystery. It draws [them] into the mystery of suffering and makes tangible [their] belief that our suffering when united with the passion and death of Christ leads to redemption.” United States Conference Of Catholic Bishops, *Built Of Living Stones: Art, Architecture, And Worship* § 91 (2000), available at <http://tinyurl.com/q2oq3ot>.

This symbolism makes the Latin cross a compelling memorial for many Christian dead. Many Christian denominations have a longstanding and consistent practice of marking graves with Latin crosses. See Winnifred F. Sullivan, *The Impossibility Of Religious Freedom* 62-65, 197-98 (2005) (describing this “fundamental part of Christian religious practice” “almost as ancient as the Christian religion itself” (quoting expert report of Dr. McGuckin in *Warner v. City of Boca Raton*, 64 F. Supp. 2d 1272 (S.D. Fla. 1999))). Catholic funerals, for example, begin with a procession led by a cleric carrying a cross. 3 *The Catholic Encyclopedia* 73 (Charles G. Herbermann et al. eds., 1913). The deceased lies with a small cross in his or her hands or the hands appear in

the shape of the cross. *Id.* at 72–73. And when the deceased is laid to rest, a cross may be planted at the head of the grave. *Id.* at 75.<sup>3</sup>

Given this powerful symbolism and the inseparable relationship between the Latin cross, Christ, and Christianity, the notion that the Latin cross has shed its religious meaning through its use as a wartime burial marker not only defies belief, it offends those who hold the Latin cross sacred. To suggest that the cross does not “carr[y] great religious significance” “demean[s] this powerful religious symbol.” *Carpenter v. City & Cnty. of San Francisco*, 93 F.3d 627, 630 (9th Cir. 1996).

**B. During the World Wars, when the military used the Latin cross to mark the graves of individual Christian soldiers on foreign soil, it used the Star of David to mark the graves of Jewish soldiers.**

Veterans of the Civil War, the Spanish American War, the Vietnam War, and the wars in Iraq and Afghanistan buried in national cemeteries rest under uniform rectangular headstones, not Latin crosses. It was only

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<sup>3</sup> Orthodox Christians likewise emphasize the cross in their funeral rites, bearing the deceased to the church in a procession headed by crosses, placing candles around the coffin in the shape of the cross, and marking their dead with a cross at the foot, not the head, of the grave so that the departed will rest facing the cross. See Archpriest Victor Sokolov, *Death, Funeral, Requiem—Orthodox Christian Traditions, Customs, and Practice*, available at <http://tinyurl.com/7zdd4x7>.

during the two World Wars and part of the Korean War that the military used cruciform grave markers, and then never for the graves of Jewish soldiers, and never for soldiers buried on American soil.

Before World War I, the government furnished uniform and rectangular headstones that contained no crosses, Stars of David, or any other religious symbols. See U.S. Department of Veterans Affairs, *Pre-World War I Era Headstones and Markers*, <http://tinyurl.com/odhqrp2>. Beginning in World War I, when American soldiers died on the battlefield, the military marked their temporary graves with a marker of their faith—the Latin cross for Christians, the Star of David or a triangular headboard for Jews. Lisa Budreau, *Bodies of War: World War I and the Politics of Commemoration in America, 1919-1933*, at 120 (2010). This was the first time the military prominently commemorated soldiers' deaths with religious emblems of the soldiers' faith. By adopting the Latin cross and the Star of David, the military chose to respect and honor fallen soldiers with a symbol of their respective religions. And by adopting *both* the Latin cross *and* the Star of David, the military recognized that the Latin



cross was an exclusively Christian symbol and an inappropriate monument to fallen Jewish soldiers.<sup>4</sup>

At the end of World War I, the nation confronted the question of where and how to permanently inter the war dead buried in temporary graves throughout the European and Pacific theaters. After Congress decided to establish permanent overseas cemeteries to house those soldiers whose families elected not to repatriate their remains, the question turned to the monuments that should mark the graves. Colonel Charles Pierce, Chief of the Quartermaster Graves Registration Service, recognized that “Hebrews object[ed] to the use of a cross, and their desire having been made mandatory by official action, it [was] necessary ... to employ a different marker for Jewish graves.” Budreau, *supra*, at 122 (quoting Letter from Charles C. Pierce to the Cemeterial Branch (July 24, 1919)). Accordingly, he recommended against retaining the cross, which would “prevent[] the desirable harmony which should characterize

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<sup>4</sup> Around this time, the military also recognized that the Latin cross was an “offensive” insignia for rabbis in the chaplaincy. See William K. Emerson, *Encyclopedia of United States Army Insignia and Uniforms* 268 (1996). It accordingly provided Jewish chaplains with their own religious insignia—a depiction of the Ten Commandments topped with a Star of David. *Id.* By identifying Christian chaplains with the Latin cross, the military further connected the Latin cross with Christianity.

national cemeteries.” *Id.* Instead, Colonel Pierce proposed a marker that would “conform as nearly as possible to the designs used in national cemeteries in the United States” with “*all references to a man’s peculiar religion ... prohibited.*” *Id.* (emphasis added). “When the crosses are eliminated,” he concluded, “such reference, by words or symbols, will become unnecessary.” *Id.* Quartermaster General W. H. Hart and the Secretary of War agreed. *Id.* at 122-23. And by the end of 1920, the War Memorials Counsel unanimously adopted the proposed uniform marker. *Id.*

In 1923, Congress created the American Battle Monuments Commission, which reversed this decision. Abandoning the plan for a uniform marker, the Commission voted to retain religious grave markers—the Star of David for Jewish soldiers, the Latin cross for Christian soldiers and, by default, for everyone else buried abroad. *Id.* at 123-24. As depicted in Figure 1, Latin crosses and Stars of David mark the graves of the American soldiers killed and buried abroad during the World Wars.<sup>5</sup>

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<sup>5</sup> In the Korean War, Latin crosses and Stars of David marked some graves in temporary cemeteries but following the war, the government repatriated all dead and buried them beneath uniform rectangular

**Figure 1—Permanent World War I Grave Markers**



That the Latin cross was for a period of time, by default, the burial marker for non-Judeo-Christian soldiers buried abroad does not mean that the military regularly buried non-Christians beneath the Latin cross or that the non-Christians buried beneath the cross recognized the cross as a secular symbol. If the Latin cross were truly secular, then the military would have used it for the Jewish war dead, and that was not the case. Moreover, families of non-Judeo-Christian soldiers could avoid having their loved ones buried beneath the symbol of Christianity by taking advantage of their right to repatriate their loved ones for burial beneath secular markers in domestic cemeteries. Approximately 60-70% of *all* American soldiers killed during the World Wars were repatriated

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headstones in the United States. See G. Kurt Piehler, *Remembering War the American Way* 155-57 (1995). There is little record of the military using crosses to mark graves in other conflicts.

and rest either under uniform rectangular headstones at Arlington or at private cemeteries according to their families' wishes. See Michael Sledge, *Soldier Dead* 150-51 (2005).

There are no statistics available as to how many repatriated soldiers were neither Jewish nor Christian. But it is safe to assume that many were repatriated. For many faiths, burial beneath the Latin cross is offensive or even blasphemous. *E.g., infra* pp. 16-17; Jehovah's Witnesses, *Why True Christians Do Not Use the Cross in Worship*, <http://tinyurl.com/mtj5r4s> (describing cross as pagan symbol condemned by Bible). Indeed, burial beneath another faith's religious symbol, especially when denied the freedom to use a symbol of one's own faith, can be seen as impugning the deceased's equal worth by suggesting that his or her faith is unworthy of formal recognition. Members of all faiths can recognize and experience this indignity.<sup>6</sup>

Even though soldiers who were neither Christian nor Jewish could not use a symbol of their own faith if buried abroad after the World Wars, nothing suggests that the military or non-Christian soldiers viewed the

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<sup>6</sup> And indeed, as discussed at *infra* pp. 15-16, the government commission responsible for military grave markers expressed dismay at the possibility that an unknown Christian soldier might be buried beneath a Star of David.

Latin cross as a symbol for all. At the time, no other religious group constituted more than a fraction of 1% of the American population and the military—perhaps reflecting an outdated insensitivity to non-Judeo-Christian soldiers—may simply have failed to appreciate that these soldiers might favor burial beneath a symbol of their own faith.<sup>7</sup> Properly understood, the military’s failure to dignify non-Judeo-Christian soldiers with burial under a religious emblem of their faith was the incidental result of the military’s recognition of only three religions during this time—“Catholic, Protestant, or Hebrew”—and its resultant provision of burial markers in the shape of only those religions’ symbols. As explained in Part II.D, the military, over time, made this clear by permitting soldiers to select religious symbols other than the Latin cross and the Star of David for their headstones as it came to recognize dozens of other faiths.

**C. The military took a variety of measures to avoid inadvertently burying non-Christian soldiers under the Latin cross.**

Between the World Wars and during World War II, the military took extra precautions both on the battlefield and in permanent cemeteries to

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<sup>7</sup> See Gallop, *Religion*, <http://tinyurl.com/28ofr4x>.

avoid imposing on non-Christian soldiers the indignity of burial beneath the Latin cross.

Where in World War I chaplains experienced “great difficulty ... in determining whether a dead soldier [was] Roman Catholic, Protestant, or a Jew,” Budreau, *supra*, at 120 (internal quotation marks omitted), by World War II army regulations required listing soldiers’ religion on dog tags to “facilitate[] the burial of the dead with the proper religious ceremonies when conditions permit, and insure[] that the proper type of permanent grave markers will be placed on all graves when reinterment takes place,” War Department, *Technical Manual No. 10-630*, at 13 (Sept. 1941). The military accordingly permitted soldiers to list “Catholic (C), Protestant (P), or Hebrew (H)” on their dog tag. See Dep’t of the Navy—Navy Historical Center, *Personal Identification Tags*, <http://www.history.navy.mil/faqs/faq70-1.htm>.

The military also took measures to restrict the use of the Latin cross as a battlefield grave marker, recognizing that even in the chaos of war non-Christians should not be buried beneath the cross. The military supplied chaplains and the Graves Registration Service unit with secular “V-shaped wooden boards” to mark each hasty burial grave “in such a way

as to insure identification.” War Department, *Field Manual No. 10-63*, at 39 (1945).

**Figure 2—V-shaped Grave Markers<sup>8</sup>**

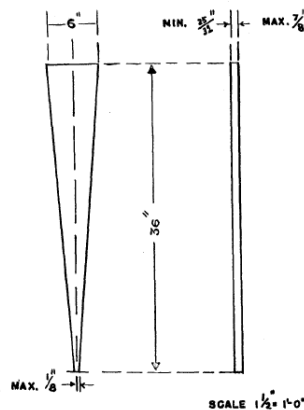


Figure 5. Temporary wooden name posts.

For burials where no boards were available, the military directed burial parties to “indicate the grave of a soldier” with “[a] stick, or large rock, or a bayonet with a helmet superimposed.” *Id.* at 16; see also Office of the Chief Quartermaster, *Handbook for Emergency Battlefield Burials and Graves Registration by Troops 4-5* (1943) (“[I]f the supply [of stakes] does become exhausted, any wood available in the area may be used. In addition, bayonets and other battlefield salvage may be used as markers to insure that location of graves will not be lost.”).

For large temporary cemeteries, the regulations continued to authorize the use of wooden crosses and Stars of David to mark the

<sup>8</sup> War Department, *Field Manual No. 10-63*, at 40 (1945).

temporary graves of Christians and Jews respectively. *Technical Manual 10-630, supra*, at 11. But “[i]n the event Hebrew markers are not available,” the War Department directed, “the crosspiece of the cross will be removed prior to placement thereof.” *Id.* And a World War II chaplain attached to a unit with a significant number of Buddhist soldiers buried soldiers beneath markers other than the Latin cross. See Israel A. S. Yost, *Combat Chaplain: The Personal Story of the World War Chaplain of the Japanese American 100th Battalion* 90 (2006).

Moreover, during the interwar period, the Graves Registration Service took measures to avoid accidentally burying unknown Jews beneath the Latin cross. When the units tasked with permanently burying the World War I dead could not identify deceased soldiers’ religions, they would place either a Latin cross or a Star of David on the graves in “proportion of known Jewish dead to known Christian dead.” Piehler, *supra*, at 131. Presumably the Graves Registration Service adopted this practice to minimize the chance that either an unknown Christian or an unknown Jew would be buried under the other faith’s symbol. In 1948, however, the Monuments Commission reversed this policy because the Commissioners feared that a Star of David might mark



the grave of “an unknown Christian.” *Id.* In so doing, the Commissioners recognized both the deep religious symbolism inherent in the Latin cross and the Star of David and the indignity burial under another religion’s symbol could cause.

Although the government on occasion inadvertently used the Latin cross during the World Wars to mark the graves of some Jewish soldiers that it could not identify, the reaction of the kin and fellow Jewish soldiers only highlighted that the cross was not viewed as a secular symbol. *See* Budreau, *supra*, at 120 (describing Jewish soldiers grieving when their “dead comrades were laid to rest, ... the sons of Moses and Jacob with a cross at the head of their grave”) (quoting Letter from Samuel J. Rudak, Co. G, 102nd U.S. Inf., AEF, to Hon. Nathan Barnert (May 23, 1918)). Jews, like other non-Christians, objected to burial beneath the Latin cross because it expressed a powerful meaning that was antithetical to the tenants of their faith. But the Latin cross was a particularly inappropriate marker for Jewish graves for another reason: The Latin cross was displayed prominently during the Crusades and the Spanish Inquisition—two major episodes of Jewish persecution. *See* Michael Hilton, *The Shadow of the Cross*, available at <http://tinyurl.com/k47nqz4>.

And while the Latin cross is no symbol of persecution today, the negative past associations emphasize that the view of the cross as properly honoring all war casualties is not universal. *Id.*

**D. The Latin cross is but one of many emblems of belief on soldiers' gravestones.**

As discussed above, even during the World Wars, when our country was far less diverse, the U.S. military recognized that the Latin cross was an inherently religious symbol that did not honor all. Instead, the military buried Jewish soldiers under the Star of David and afforded other non-Christian soldiers the option of burial at home under a secular symbol. Since then, the military has continued to make clear that it views the Latin cross as a Christian symbol. Today, the government buries veterans under uniform rectangular headstones with a small space for the veteran's family to inscribe an emblem of their specific religious belief.

*See U.S. Department of Veterans Affairs, Available Emblems of Belief for Placement on Government Headstones and Markers,*

[www.cem.va.gov/hmm/emblems.asp](http://www.cem.va.gov/hmm/emblems.asp). As can be seen from Figure 3, the Latin cross—“(1) Latin (Christian) cross”—is one of 61 emblems of belief that families may choose. The list includes, among other symbols, 20 versions of the cross, the Jewish Star of David, two Muslim symbols (the

5-pointed star and the Crescent and Star), the Mormon Angel Moroni, the Wiccan pentacle, and the Atheist atom. Families may also request a new religious symbol if the emblem of their loved one's faith is unavailable.

*See id.*

**Figure 3—Excerpt of Available Emblems of Belief**



This expansion occurred as the military came to formally recognize a broader array of religions. In 1922, when the military first permitted families, if they so wished, to include a religious emblem on the government-furnished headstones in domestic cemeteries, the military limited “the choice of emblem ... to the Latin cross for the Christian faith and the Star of David for the Jewish faith.” U.S. Dep’t Veterans Affairs, *History of Government Furnished Headstones and Markers*, <http://tinyurl.com/nx.fbz.p8>; Dean W. Holt, *American Military Cemeteries* 379 (2d ed. 2009). Soldiers of other faiths soon pushed for a symbol of their own. Where during World War II, one Buddhist Sergeant expressed being unable to “forget that when I entered the army they wouldn’t put a ‘B’ on my dog tag,” Yost, *supra*, at 104, by 1951, after many Buddhists served in the Korean War, the government permitted Buddhists to include the Dharma Wheel on their headstones, *see* U.S. Dep’t Veterans Affairs, *History of Government Furnished Headstones and Markers*, *supra*. And the military continued to expand the available emblems as soldiers and their families seized the opportunity to select a symbol of their own beliefs.

By expanding the number of available emblems of belief, the government again acknowledged—as it did during the World Wars—that the Latin cross and the Star of David served the sole purpose of indicating and honoring the deceased’s faith. The Department of Veterans Affairs’ description of the Latin cross emblem as “(1) Latin (*Christian*) Cross” further evidences the federal government’s recognition that the Latin cross symbolizes the Christian religious beliefs of Christian deceased and that the Latin cross has not taken on a broader secular meaning. *See* Veterans Affairs, *Available Emblems of Belief*, *supra* (emphasis added).

## **II. The Latin Cross Has Not Developed A Secular, Secondary Meaning Through Its Limited Use In Monuments.**

Given that the Latin cross has a strong Christian meaning and is used as grave marker for Christians, it is unsurprising that the Latin cross never developed into a universal secular symbol of military service and sacrifice. The government has never included the Latin cross in a prominent publically designed war memorial or monument. And standalone Latin crosses rarely appear in privately created war memorials.

**A. Prominent war monuments avoid the Latin cross.**

Even when the country had far less religious diversity than it does today, non-Christian soldiers opposed, and the government avoided, using the Latin cross in government war memorials. When, at the end of the First World War, Congress interred an unknown soldier in Arlington National Cemetery to “typify the spirit and sacrifice of the people of the Republic of United States of America in the great World War,” a Latin cross appeared nowhere on his grave. House Committee on Military Affairs, *Return of Body of Unknown American who Lost His Life During World War: Hearings Before the Committee on Military Affairs House of Representatives* 3 (1921). During the design competition, the Monuments Commission briefly considered a design that included a Latin cross. But the Jewish Welfare Board protested, reminding the Commission that the “anonymous individual may well have been a Jew” and that Jews staunchly opposed being commemorated with the Latin cross. Piehler, *supra*, at 121.

After receiving these objections, the Commission declined to include a Latin cross in the memorial. Instead, the monument honors the unknown soldier’s service and sacrifice with three wreaths representing

the war's major battles and three Greek figures representing Peace, Victory, and Valor. See Arlington National Cemetery, *The Tomb of the Unknown Soldier*, <http://tinyurl.com/l9urtrn>. The decision to forgo the use of a Latin cross—even though such crosses prominently marked thousands of Christian World War I veterans' graves—illustrates that the Latin cross had no well-recognized meaning as a secular symbol of military sacrifice at the time.

Other prominent public war memorials honor those who served without Latin crosses. The World War II Memorial honors the 16 million who served with a wreath and pillar representing the soldiers from each state and territory. It honors the more than 405,000 Americans who died with 4,048 gold stars. And it memorializes the trials and triumphs of the war with 24 bas relief sculptures that bring to life the war's most ordinary and memorable moments—enlistment, embarkation, agriculture, the Normandy Beach landing, and a field burial, in which the deceased's graves are marked with inverted rifles topped with helmets, not Latin crosses or Stars of David. See National Park Service, *World War II Memorial*, [www.nps.gov/wwii/historyculture/index.htm](http://www.nps.gov/wwii/historyculture/index.htm).

The Marine Corps War Memorial, popularly known as the Iwo Jima Memorial, honors the “uncommon valor” of all marines with the image of six servicemembers’ iconic struggle to raise the American flag on the top of Mount Suribachi during the Battle of Iwo Jima. *See* National Park Service, *US Marine Corps War Memorial*, <http://tinyurl.com/o9gt6z4>.

The Korean War Veterans Memorial honors veterans with 2,500 images depicting troops in battle, a phalanx of 19 statues depicting a squad on patrol, and a reflecting pool. *See* Korean War Veterans Memorial Association, *The Korean War Veterans Memorial*, <http://www.koreanwarvetsememorial.org/memorial?from=national>.

Finally, the Vietnam Veterans Memorial evokes the war’s great sacrifice by listing the name of every servicemember killed or missing in action. Statues of three servicemen look towards the names of their fallen comrades in solemn tribute. *See* National Park Service, *Vietnam Veterans*, [www.nps.gov/vive/index.htm](http://www.nps.gov/vive/index.htm).

In none of these memorials do Latin crosses prominently appear. And nobody could plausibly suggest that the absence of the Latin cross has somehow made these memorials less effective, powerful, or timeless.



**B. Few memorials include crosses, even fewer include Latin crosses**

Most of the government's examples involve crosses other than the Latin cross. The overwhelming majority of American war memorials include no Latin cross. And the few memorials that do contain Latin crosses contain no standalone Latin crosses that purport to honor all veterans. The Latin crosses in these monuments appear alongside similarly sized monuments honoring soldiers of all faiths and are outliers in the long tradition against using the Latin cross to honor all who served.

The Smithsonian's Inventory of American Sculpture lists over 3,000 Civil War memorials.<sup>9</sup> Relying on this database, the government (at 34, 36) points out that "at least 114 Civil War memorials feature crosses." But the government fails to describe nearly all of these memorials, and for good reason: Few of these memorials actually feature *Latin* crosses.<sup>10</sup>

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<sup>9</sup> The Inventory of American Sculpture is part of the Smithsonian's Inventories of American Painting and Sculpture, a fully searchable database documenting over 400,000 artworks dating back to the founding era. See Smithsonian American Art Museum, *National Art Inventories*, <http://americanart.si.edu/research/programs/inventory/>.

<sup>10</sup> Based on our search of the database we located only 94 civil war memorials that actually contain crosses. Searching "civil war" and "cross" yields 136 results, but many are false positives, such as monuments with descriptions that include the word cross in other contexts, e.g., crossing a

Many feature the Greek cross, the Maltese cross, the Celtic cross, the Southern Cross of Honor, or the Confederate flag. These symbols, as described and depicted below, have well-recognized secular meanings in the Civil War context. And because they look different from the Mt. Soledad Latin cross (depicted in Figure 4 below), their secular use, just like the Red Cross's secular use, in no way transforms the Latin cross into secular symbol.

**Figure 4—Mt. Soledad Latin cross**



The Union's 5th Corps and 6th Corps, respectively, used the Greek cross and the Maltese cross for their insignia (depicted in Figure 5). When these crosses appear in monuments honoring these corps, the crosses have a clear secular meaning: they depict the corps' insignia, invoking these corps' service. At least 34 monuments pay tribute to the 6th Corps with a

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river. We then reviewed each monument's description to determine what form of cross the monument contained.

Greek cross, and at least 22 more honor the 5th Corps with a Maltese cross.

**Figure 5—Maltese Cross and Greek Cross**



Because these crosses look quite different from the Mt. Soledad Latin cross depicted in Figure 4, their appearance in these memorials does not suggest that the Latin cross also has a secular meaning. Despite the military adopting the Greek and Maltese crosses for its units' insignia, the government and its amici have presented no evidence that the military has ever considered the Latin cross an appropriate symbol for any insignia, medal, or other decoration.

Likewise, the Celtic cross (three monuments), the Southern Cross of Honor (five monuments), and the confederate flag (four monuments) are all distinct crosses used in Civil War monuments that have well-recognized secular meanings. During the Celtic revival, the period of renewed Celtic nationalism in the late-19th Century, the movement

displayed the Celtic cross as a symbol of Celtic identity.<sup>11</sup> For the Irish units that served in the Civil War, the Celtic cross honored their heritage. In this context, it makes perfect sense that the Irish Brigade Monument honors the Irish brigade with a Celtic cross.

The Southern Cross of Honor is an eight-pointed, cross pattée that appears in a medal honoring Confederate military service. And the Confederate flag, which includes a cross, has a clear secular meaning as the flag of the Confederate States of America. These crosses account for 71 of the 94 crosses used in Civil War memorials.

Civil War sculptures, to the extent that they incorporate the Latin cross, do not use the Latin cross as a standalone symbol honoring all soldiers' service. In nearly all of these monuments, the Latin cross is a small part of a larger memorial. The government points to only one monument to the contrary, the 142nd Pennsylvania Infantry Memorial at Gettysburg. The Gettysburg memorials, typically commissioned by

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<sup>11</sup> Emma McVeigh, *Neither Irish nor British: The Identities of Sculpture in Northern Ireland, 1921-1951*, 21 *Sculpture J.* 145, 146 (2012) (“The association between the Celtic cross and Irish nationalism was heightened during the 1920s as the form, derived from an ancient Gaelic past appropriated by nationalists and the Free State government, was popular for memorials dedicated to the Irish War of Independence and heroes of republicanism.”).

members of a particular regiment and their supporters, honor individual units and frequently mark the exact location where the unit fought on the battlefield. See Gettysburg Foundation, *Battlefield Monuments*, <http://www.gettysburgfoundation.org/17/gettysburg-monuments>. This memorial accordingly stands alongside hundreds of other similarly sized monuments on the Gettysburg battlefield that feature no Latin cross.

It is particularly noteworthy that soldiers and their supporters erected so few memorials that include Latin crosses during the Civil War, because the military was almost exclusively Christian then. Of the over 3 million who served, for example, only an estimated 10,000, or .33%, were Jewish. See *Encyclopedia of the American Civil War: A Political, Social, and Military History* 1070-71 (David S. Heidler et al, eds. 2000). Yet the Latin cross, by our count, appears in only 23 out of over 3,000 Civil War memorials in the Smithsonian database. This strongly suggests that even during the greater religious homogeneity of the Civil War, the country did not honor or associate soldiers' collective sacrifice with the Latin cross.

Finally, neither the Canadian Cross of Sacrifice nor the Argonne Cross at Arlington National Cemetery establishes a tradition of using the Latin cross as a secular symbol to honor all. Unlike the Mt. Soledad cross,

these crosses appear in a large cemetery filled with many different memorials of comparable size and stature, each of which honors the dead and consoles mourners in its own way.<sup>12</sup> Moreover, the Canadian Cross of Sacrifice was a gift of the Canadian government. See Arlington National Cemetery, *Canadian Cross of Sacrifice*, <http://tinyurl.com/p5tww74>. It is part of a *Commonwealth* tradition—not an American tradition—of placing a Latin cross in Commonwealth cemeteries. See Commonwealth War Graves Commission, *Our Cemetery Design and Features*, <http://tinyurl.com/p34kkq4>. Because the Canadian Cross was a gift from a foreign government, it says nothing about the American memorial tradition, in which the military used the Latin cross almost exclusively to mark the graves of individual Christian soldiers and carefully avoided using the cross to memorialize non-Christians. These two crosses, one of which was a gift from a foreign government, do not negate the United States' widespread and longstanding recognition that the Latin cross is an inherently Christian symbol inappropriate for honoring all soldiers.

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<sup>12</sup> For this reason, the crosses displayed at Arlington have a less powerful religious message than the Mt. Soledad cross. The presence of many similarly sized monuments and memorials may counter the impression that the government is promoting Christianity. See *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 614-15 (1989).

\* \* \*

The Latin cross has been and remains a central Christian symbol. It communicates a distinctly Christian message when used in connection with death and burial rituals for fallen soldiers. Non-Christian soldiers and their families do not embrace this message, just as Christians do not embrace the Star of David. This is why soldiers' families, when given the freedom to commemorate soldiers' service and sacrifice with a symbol of their own choosing, rarely, if ever, choose burial beneath the Latin cross.

Nor does the Latin cross convey a secular message when used in a veterans memorial. Whether a Latin cross purports to honor veterans by depicting a collective burial marker or by invoking Christ's suffering and triumph in the name of all veterans, in both cases it communicates only a Christian message. In the first case it honors only fallen *Christian* soldiers by depicting the religious symbol used to mark Christian soldiers' graves. In the second case, the Latin cross purports to honor all soldiers in the name of Christ. The Latin cross may be a fitting symbol for honoring Christian soldiers, but it is not and has never been a secular symbol that honors soldiers of all faiths.

## CONCLUSION

This court should conclude that the Latin cross has no well-recognized meaning as a secular symbol of military sacrifice.

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,065 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 14 point Century Schoolbook font.

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on December 22, 2014.

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