

No. 08-472

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IN THE  
Supreme Court of the United States

—  
KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL.,  
*Petitioners,*

v.

FRANK BUONO,  
*Respondent.*

—  
**On Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit**

—  
**BRIEF OF FORMER HIGH-RANKING MILITARY  
OFFICIALS COLONEL DAVID ANTOON,  
BRIGADIER GENERAL ISRAEL DRAZIN,  
VICE-ADMIRAL BERNARD KAUDERER,  
COLONEL RICHARD L. KLASS,  
BRIGADIER GENERAL A.A. "TONY" VERRENGIA,  
AND COLONEL LAWRENCE B. WILKERSON  
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT**

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**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES..... iii**

**INTEREST OF *AMICI CURIAE*..... 1**

**SUMMARY OF ARGUMENT.....3**

**ARGUMENT .....5**

**I. THE MILITARY IS A HIGHLY RELIGIOUSLY DIVERSE INSTITUTION. .... 5**

**II. THE MEMORIAL AT ISSUE IN THIS CASE CONVEYS AN IMPERMISSIBLE MESSAGE OF RELIGIOUS ENDORSEMENT. .... 8**

**A. National Memorials Are Quintessential Examples Of Government Action Subject To Establishment Clause Limits..... 10**

**B. The Message Conveyed By The Memorial Is The Commemoration Of *Christian* War Dead And Veterans..... 12**

**C. Not All War Memorials That Use Religious Symbols Convey Impermissible Messages. .... 14**

**III. THE MESSAGE CONVEYED BY THE MEMORIAL AT ISSUE FOSTERS DIVISIVENESS AND INJURES THE MILITARY AS AN INSTITUTION. .... 17**

**A. The Message Conveyed By The Memorial Undermines Military Cohesion, Which Is Crucial To Military Functioning..... 18**

B. The Message Conveyed By The Memorial Undermines Military Recruiting.....	22
CONCLUSION .....	25

**TABLE OF AUTHORITIES**

**CASES**

iv

*Murphy v. Bilbray*, No. 90-134 GT, 1997 WL  
754604 (S.D. Cal. Sept.

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- Thomas W. Britt et al., *1 Military Life: The Psychology of Serving in Peace and Combat* (2006)..... 18
- Seymour Brody, *350 Year Commemoration of Jews in America's Military* (2004), available at <http://www.nmajmh.org/americanJewish/docs/350th%20book.pdf>..... 6
- Damien Cave, *For a General, a Tough Mission: Building the Army*, N.Y. Times, Feb. 5, 2006 ..... 24

Juan Cole, <i>Engaging the Muslim World</i> (2009) .....	24
Alan Cooperman, <i>Inquiry Sought over Evangelical Video</i> , Wash. Post, Dec. 11, 2006, at A03 .....	21
Bernd Debusmann, <i>Fear of Bias Keeps U.S. Muslims Out of Military</i> , Reuters.com, Feb. 15, 2007, <a href="http://www.reuters.com/article/newsOne/idUSSIB55240620070215">http://www.reuters.com/ article/newsOne/idUSSIB5524062007021 5</a> .....	25
Defense Equal Opportunity Management Institute – Guiding Principles, <a href="http://www.deomi.org/AboutDEOMI/GuidingPrinciples.cfm">http://www.deomi.org/AboutDEOMI/ GuidingPrinciples.cfm</a> .....	7
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Dep’t of Def., Directive 1350.2 (Aug. 18, 1995).....	19
Dep’t of Def., <i>Human Goals Charter</i> (July 29, 1998), available at <a href="http://www.defenselink.mil/news/newsarticle.aspx?id=43191">http://www.defenselink.mil/news/newsart icle.aspx?id=43191</a> .....	23
Dep’t of Veterans Affairs, General Information Sheet 40-1330, <a href="http://www.va.gov/vaforms/va/pdf/VA40-1330.pdf">www.va.gov/vaforms/va/pdf/VA40- 1330.pdf</a> .....	8, 16

Noah Feldman, *From Liberty to Equality:  
The Transformation of the Establishment  
Clause*, 90 Cal. L. Rev. 673 (2002) ..... 9

Linda D. Kozaryn, *Muslim Troops Highlight  
Nation's Diversity*, Am. Forces Press





Richard Whittle, *Uncle Sam Wants U.S. Muslims to Serve*, Christian Science Monitor, Dec. 27, 2006..... 24

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Leonard Wong et al., *Why They Fight: Combat Motivation in the Iraq War* (2003)..... 18

## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici* are former high-ranking officers of the United States military. They are deeply interested in this case because it has serious implications for the military's functioning, including its ability to accomplish its missions and its efforts to recruit the most qualified personnel possible. *Amici's* judgments in this area are based upon many decades of first-hand experience, at a variety of levels, with the workings of our nation's military.

Colonel David Antoon graduated from the U.S. Air Force Academy, after which he became a C-130 aircraft commander and instructor pilot. Having participated in over one hundred tactical combat missions in Vietnam and Cambodia, he was awarded the Distinguished Flying Cross and three Air Medals. He spent twenty-five years on active duty, followed by many years as a commercial pilot. He also graduated from Air Command and Staff College as well as Air War College, and obtained two master's degrees (MBA Trinity University and MS Air Force Institute of Technology (Operations Research)).

Brigadier General Israel Drazin, an ordained rabbi, entered Army Active Duty at age twenty-one as the youngest U.S. Chaplain ever to serve on active duty. In his thirty-one years of military service, he

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<sup>1</sup> The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*

was at the forefront of efforts to foster both religious accommodation and religious tolerance within the armed services. A trained lawyer, he was instrumental in successfully defending the Army Chaplaincy against Establishment Clause attacks in the 1980s. As the first Jewish person to serve as Assistant Chief of Chaplains for the U.S. Army, he revolutionized the role of military chaplains, making them responsible for the free exercise rights of all military personnel and requiring them to provide for the spiritual needs of all servicemembers, regardless of their religious beliefs.

Vice-Admiral Bernard Kauderer was commander of the Submarine Force, U.S. Atlantic Fleet (1983-86), and the Submarine Force, U.S. Pacific Fleet (1981-83). During his thirty-three-year military career, he also served as Deputy Director of Research, Development, Test and Evaluation on the staff of the Chief of Naval Operations (1979-81). Following his retirement from the Navy, Vice-Admiral Kauderer was instrumental in a successful effort to build the first Jewish chapel at the United States Naval Academy.

Colonel Richard L. Klass, U.S. Air Force (retired), is a distinguished graduate of the U.S. Air Force Academy (1962) and the National War College (1977). He served in the Office of the Under Secretary of Defense (Policy) (1977-1980) and U.S. Air Forces Europe (1972-76). He also served in the Executive Office of the President as a White House Fellow (1970-72). As a Forward Air Controller in Vietnam, Colonel Klass logged over five hundred combat hours during the course of over two hundred air missions. He was awarded the Silver Star,

3

Distinguished Flying Cross, 11 Air Medals, and a Purple Heart. Colonel Klass holds two master's degrees from Oxford University, where he attended as a Rhodes Scholar.

nation. This diversity extends to religion, with almost a third of servicemembers identifying themselves as non-Christians. This is no new phenomenon; members of minority faiths have served with distinction in every war in United States history, including World War I.

Recognizing the important past and future contributions by people of minority faiths to the United States military effort, *amici* believe that the cross in the Mojave Desert – one of a small number of a national war memorials – has the impermissible effect of communicating government endorsement of Christianity. Unlike other war memorials that incorporate secular imagery or religious imagery from a variety of faiths, the cross conveys the message that the military values the sacrifices of Christian war dead over those of servicemembers from other faith traditions.

That is not only a clear constitutional violation, but is also harmful to the military as an institution, adding to social divisiveness in the very way that the Establishment Clause is intended to avoid. Based on many decades of experience in the military, *amici* believe that the message sent by a war memorial like the cross undermines unit cohesion – which is absolutely critical to the military's ability to function in combat, as well as in other settings – by fostering a military culture that is intolerant of religious difference and that causes minority populations to feel excluded. In addition, that message undermines efforts by the military to reach out to members of minority faiths, and to recruit and retain them to serve as part of the nation's armed forces, even though such individuals often possess skills (such as

5

foreign language proficiency) that are essential to the military's mission.

## **ARGUMENT**

### **I. THE MILITARY IS A HIGHLY R**

Former Secretary of State Colin Powell has publicly highlighted the religious diversity of the U.S. military, singling out the service of Kareem Khan, a Muslim corporal who was killed in a bomb explosion in Baquba, Iraq, in August 1997. Corporal Khan's remains are now interred in Arlington National Cemetery, and the army has recognized his service with the Bronze Star and the Purple Heart. *See More on the Soldier Kareem R. Khan*, The Lede: The New York Times News Blog, Oct. 19, 2008, *available at* <http://thelede.blogs.nytimes.com/2008/10/19/more-on-the-soldier-kareem-r-khan/>; *see also* Linda D. Kozaryn, *Muslim Troops Highlight Nation's Diversity*, Am. Forces Press Serv., Jan. 26, 1999, *available at* <http://www.defenselink.mil/news/newsarticle.aspx?id=42671>.

The military's religious diversity is no new phenomenon. Jews, for example, have fought for the United States in every major conflict in its history. *See* Seymour Brody,





1, 1997), *available at* <http://www.peterson.af.mil/shared/media/documents/AFD-090212-058.pdf> (setting forth “Core Values,” including “[r]eligious toleration,” that “remind us what it takes to get the mission done” and are “the glue that unifies the force and ties us to the great warriors and public servants of the past,” and stating that “[m]ilitary professionals must remember that religious choice is a matter of individual conscience” and that “[p]rofessionals, and especially commanders, must not take it upon themselves to change or coercively influence the religious views of subordinates”). It is also reflected in more specific directives that recognize and honor individual servicemembers’ varying backgrounds and beliefs. *See, e.g.*, Dep’t of Veterans Affairs, General Information Sheet 40-1330, [www.va.gov/vaforms/va/pdf/VA40-1330.pdf](http://www.va.gov/vaforms/va/pdf/VA40-1330.pdf) (last visited July 30, 2009) (allowing members of the military to choose a headstone featuring one of more than three dozen “authorized emblems,” including symbols of Islam, Judaism, Buddhism, and other faiths); News Release, Dep’t of Defense, Dep’t of Defense Identifies Army Casualties (Aug. 9, 2007), *available at* <http://www.arlingtoncemetery.net/krkhan.htm> (including photo of Kareem Khan’s gravestone at Arlington National Cemetery, which features a Muslim star and crescent).

## II. THE MEMORIAL A

endorsement. “What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion.” *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O’Connor, J., concurring); *see also* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 Cal. L. Rev. 673, 698 (2002) (“[T]he Court has now fully adopted the endorsement test . . .”). The message conveyed by a display is determined by analyzing “whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of [religion].” *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O’Connor, J., concurring in the judgment); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37-43 (2004) (O’Connor, J., concurring in the judgment).<sup>3</sup>

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<sup>3</sup> *Amici* agree with Respondent’s argument that the issue of whether there is an Establishment Clause violation in this case is *res judicata*

**A. National Memorials Are Quintessential Examples Of Government Action Subject To Establishment Clause Limits.**

Only government action, of course, is subject to Establishment Clause limits. *See Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). In this case, regardless of whether a land swap is carried out that ultimately locates the memorial at issue on a small plot of private property, there is nevertheless government action by virtue of Congress's designation of the Mojave cross as a national memorial. *See* Dep't of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, § 8137, 115 Stat. 2230, 2278 (2001).

Such designations are exceedingly rare. There are currently only forty-nine structures whose public significance is sufficient to justify explicit legislative recognition as a national memorial. This list of national memorials includes, among others, the Washington Monument, the Lincoln Memorial, and the Vietnam Veterans Memorial – structures that have extraordinary meaning for current and former members of the military as well as for other citizens. *See* 16 U.S.C. § 431 note.

This Court made clear just last Term that memorials are an important mechanism through which governments communicate with the public. “Governments have long used monuments to speak to the public. . . . Triumphal arches, columns, and other monuments have been built to commemorate military victories and sacrifices and other events of

civic importance.” *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132-33 (2009); *see also id.* at 1133 (purpose of monument is typically “to convey some thought or instill some feeling in those who see the structure”). Designation of a structure as a national memorial is thus nothing less than a statement by the federal government – a way in which the government adopts and amplifies whatever message the memorial conveys to its observers.

Such designation has immediate practical consequences as well. The National Parks Service is statutorily required to exercise “supervision, management, and control” over national monuments, a category that includes national memorials. *See* 16 U.S.C. § 2. There is no exception to this requirement for monuments located on private land; indeed, the statute clearly contemplates monuments of that sort. *See id.* § 431 (discussing national memorials that “are situated upon a tract covered by a bona fide unperfected claim or held in private ownership”). Adding to the Service’s maintenance obligations, Congress explicitly allocated funds for the Mojave cross’s improvement, while also stipulating that federal officials will maintain their responsibilities for the cross even after the land transfer. *See* Pub. L. No. 107-117, § 8137(c), 115 Stat. at 2278-79 (providing \$10,000 in funds for Service to acquire and install replicas of original plaque and cross); Dep’t of Defense Appropriations Act of 2004, Pub. L. No. 108-87, § 8121(a), 117 Stat. 1054, 1100 (2003) (“Notwithstanding the conveyance of the property under this subsection, the Secretary shall continue to carry out the responsibilities of the Secretary under such section 8137.”).

For these reasons, it is clear that the memorial at issue must comply with the Establishment Clause. As one of just a few dozen national memorials, as a monument similar to the ones discussed by this Court in *Summum*, and as a structure whose upkeep is separately provided for by congressional statute, the Mojave cross is, and is understood by *amici* to be, government action.<sup>4</sup>

**B. The Message Conveyed By The Memorial Is The Commemoration Of *Christian* War Dead And Veterans.**

Since the memorial is subject to Establishment Clause limits, it is unconstitutional if it conveys a message of religious endorsement in the eyes of an

That message is *not*, as the memorial’s defenders claim, one of commemoration for all war dead and veterans, or for all veterans of World War I. *See Buono v. Kempthorne*, 502 F.3d 1069, 1072 (9th Cir. 2007) (plaque that originally accompanied cross stated that it was “Erected in Memory of the Dead of All Wars”); *id.* at 1074 (Congress sought to “honor[ ] the American veterans” of World War I). What is conveyed by the cross, rather, is respect solely for the sacrifices of *Christian* soldiers – who, as discussed above, are not the only American soldiers who fought and lost their lives in World War I, or in any of the other conflicts in this nation’s history.

That is so because the cross is “the preeminent symbol of Christianity,” “exclusively a Christian symbol, and not a symbol of any other religion.” *Id.* at 1072 (internal quotation marks omitted). Thus, standing alone on a dramatic ledge in the middle of the Mojave Desert, the cross at issue in this case tells observers that American

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religious symbol where a nonreligious one likely would have done as well.” *Id.* at 14. And in *Greater Houston Chapter of American Civil Liberties Union v. Eckels*, 589 F. Supp. 222 (S.D. Tex. 1984), the court invalidated a war memorial that displayed a cross and a Star of David. The court concluded that “their primary effect is to give the impression that only Christians and Jews are being honored by the county,” even though “[t]he evidence is clear that these are not the only two religions in Harris County nor the only two religions of the county’s war dead.” *Id.* at 235; *see also* *Buono v. Norton*, 371 F.3d 543, 549 n.5 (9th Cir. 2004); *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 626 (9th Cir. 1996) (O’Scannlain, J., concurring in the result) (“[T]he City’s use of a cross to memorialize the war dead may lead observers to believe that the City has chosen to honor only Christian veterans.”); *Murphy v. Bilbray*, 782 F. Supp. 1420, 1436 (S.D. Cal. 1991), *aff’d*, 990 F.2d 1578 (9th Cir. 1993).

**C. Not All War Memorials That Use Religious Symbols Convey Impermissible Messages.**

Certain groups supporting Petitioners argue that if the cross in this case conveys an impermissible, non-secular message, then so too must any number of other war memorials across America, and indeed the world. *See* Brief of *Amici Curiae* Veterans of Foreign Wars of the United States et al. (“VFW Amicus Brief”) at 5-6, 10-14; Brief of *Amicus Curiae* The American Legion Department of California (“American Legion Amicus Brief”) at 13-16. *Amici* do not agree with this claim.





Information – Monuments and Memorials, [http://www.arlingtoncemetery.org/visitor\\_information/monuments.html](http://www.arlingtoncemetery.org/visitor_information/monuments.html) (last visited July 30, 2009) (listing dozens of secular memorials); *cf. Van Orden v. Perry*, 545 U.S. 677 (2005) (Ten Commandments monument surrounded by secular monuments constitutional); *Lynch*, 465 U.S. at 671 (nativity scene surrounded by secular Christmas decorations constitutional).

Similarly, *amici* do not object in any way to the use of crosses to mark the graves of individual servicepersons. *See* American Legion Amicus Brief at 14. Such crosses communicate the *individuals'* faith and desire to be remembered in a particular religious fashion. They do not express a message of *governmental* endorsement of religion. *See Sumnum*, 129 S. Ct. at 1132-33 (Souter, J., concurring in the judgment) (“[T]here are circumstances in which government maintenance of monuments does not look like government speech at all. Sectarian identifications on markers in

endorses these faiths whenever their emblems are selected by individual servicemembers.

Accordingly, this Court should not be swayed by the slippery slope arguments presented by the groups supporting Petitioners. A holding that a government-sponsored Latin cross is unconstitutional when it is unaccompanied by any other monuments, religious or otherwise, and is unconnected to any particular servicemember's memory, would in no way challenge the validity of the many war memorials that incorporate religious symbolism in permissible ways, or make suspect the use in military cemeteries of headstones that contain religious symbols requested by individuals.

### **III. THE MESSAGE CONVEYED BY THE MEMORIAL AT ISSUE FOSTERS DIVISIVENESS AND INJURES THE MILITARY AS AN INSTITUTION.**

This Court has stressed that one purpose of the Establishment Clause is to avoid fostering social strife and division. *See Van Orden*, 545 U.S. at 698 (Breyer, J., concurring in the judgment) (Establishment Clause “seek[s] to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike”); *Lee v. Weisman*, 505 U.S. 577, 588 (1992); *Engel v. Vitale*, 370 U.S. 421, 429 (1962) (Establishment Clause aims to prevent the “anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another”). The message conveyed by the cross in the Mojave Desert fosters just such divisiveness, and in a particularly pernicious way – it harms the military as an institution, undermining the cohesion that is

crucial to military success and damaging recruitment efforts. *See generally Haig v. Agee*, 453 U.S. 280, 307 (1981) (“It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation.” (internal quotation marks omitted)).

**A. The Message Conveyed By The Memorial Undermines Military Cohesion, Which Is Crucial To Military Functioning.**

Nothing is more important to military functioning than internal cohesion. When soldiers trust one another and feel a common sense of patriotism and purpose, the military is able to function effectively and achieve its many challenging aims. As one recent Army War College study put it, “cohesion, or the strong emotional bonds between soldiers, continues to be a critical factor in combat motivation.” Leonard Wong et al., *Why They Fight: Combat Motivation in the Iraq War* 23 (2003). “[C]ohesion places a shared responsibility for the success of the unit on each individual while giving each soldier the confidence that someone else is watching over them.” *Id.*; *see also* Thomas W. Britt et al., 1 *Military Life: The Psychology of Serving in Peace and Combat* 18 (2006).

But military cohesion can easily be imperiled by discrimination, prejudice, and subtler exclusionary practices. The military’s long struggle with racial integration is instructive in this regard. The military integrated following World War II, but powerful racial divisions endured for decades, particularly between the more diverse enlisted personnel and the nearly all-white officer corps.

**19**

**These divisions persistently undermined military effectiveness as minority recruits felt alienated from their officers and the officers lacked sufficient**

at least to atheists and agnostics. Such an effort would thus be counterproductive in that it would decrease unit cohesion and morale . . . .

Erik Wingrove-Haugland, *A Pluralistic Approach to Religion in the Military: Accommodating Diversity, Utilizing Consensus, Motivating Sacrifice, and Encouraging Growth* (paper for 2007 International Symposium for Military Ethics), *available at* <http://www.usafa.edu/isme/ISME07/Wingrove-Haugland07.html> (last visited July 30, 2009); *see also, e.g., United States Air Force – Core Values, supra* (quoting the Secretary of the Air Force as stating that “[c]ore values,” including respect for all religions, “make the military what it is,” since they “instill confidence, earn lasting respect, and create willing followers,” are “the values that anchor resolve in the most difficult situations,” and “are the values that buttress mental and physical courage when we enter combat”).

Here, as discussed above, the memorial in the Mojave Desert conveys a message of religious exclusion, one that might lead “observers to believe that the [government] ha[d] chosen to honor only Christian veterans,” even though many non-Christian servicemembers fought and lost their lives in World War I and other conflicts. *Buono*, 371 F.3d at 549 n.5 (quoting *Eugene*, 93 F.3d at 626 (O’Scannlain, J., concurring)); *see also, e.g., McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 909 (2005) (Scalia, J., dissenting) (symbol may be “so closely associated with a single religious belief that [its] display can reasonably be understood as preferring one religious sect over

another”). This message is conveyed to members of the religiously diverse military as well as members of the general public – and it is the former group that can be expected to be particularly attentive to and affected by the message associated with a national war memorial, which honors the very type of sacrifice that they themselves can envision making.

Exclusionary messages like this one drive a symbolic wedge between Christian and non-Christian soldiers, making the numerous members of minority religious groups feel marginalized – less valued and less a part of the group. Such exclusionary messages can cause real harm and have real effects on military functioning. This is illustrated by a number of incidents in which servicemembers have expressed discomfort with actions by their leadership that appear to endorse Christianity over other religions – actions that have had predictably negative consequences for morale, and that, in many cases, the government has taken steps to correct. *See, e.g.,* Dep’t of the Air Force, *Report of the Headquarters Review Group Concerning the Religious Climate at the U.S. Air Force Academy*, at i-iii, 7-8, 23 (2005), available at [http://www.foxnews.com/projects/pdf/HQ\\_Review\\_Group\\_Report.pdf](http://www.foxnews.com/projects/pdf/HQ_Review_Group_Report.pdf) (addressing conditions at the Air Force Academy that left “the impression among some cadets that USAFA was insensitive to their religious beliefs and needs”); Josh White, *Officers’ Roles in Christian Video Are Called Ethics Breach*, Wash. Post, Aug. 4, 2007, at A08; Alan Cooperman, *Inquiry Sought over Evangelical Video*, Wash. Post, Dec. 11, 2006, at A03 (citing comments by an Army general that President Bush was “appointed by God” and

that Muslims worship “an idol”); Muslims for a Safe America – Should American Muslims Join the American Armed Forces?, Nov. 9, 2008, <http://muslimsforasafeamerica.org/?p=5> (“Muslims for a Safe America”).

The cross at issue in this case is not as directly harmful as these more overt instances of religious preference and discrimination. But it nevertheless strikes at the heart of what makes the military function, promoting social divisiveness and undermining unit cohesion and *esprit de corps*. As General Douglas MacArthur observed, “[t]he unflinching formula for production of morale is patriotism, self-respect, discipline, and self-confidence within a military unit, joined with fair treatment and merited appreciation from without. . . . It will quickly wither and die if soldiers come to believe themselves the victims of indifference or injustice on the part of their government . . . .” *United States Air Force – Core Values, supra* (internal quotation marks omitted). The national memorial in the Mojave consisting solely of a Christian cross speaks of just such indifference to members of religious minorities.

#### **B. The Message Conveyed By The Memorial Undermines Military Recruiting.**

The Department of Defense has articulated its recruitment goals as follows: “The defense of the nation requires a well-trained volunteer force, military and civilian, regular and reserve. To provide such a force, we must increase the attractiveness of a career in the Department of Defense so that service members and civilian



23

employees will feel the highest pride in themselves,

These problems with Muslim recruitment are worrisome. The military has struggled in recent years to attract sufficient numbers of new soldiers. In 2005, for instance, the active-duty Army missed its recruitment target by the biggest margin since 1979. Damien Cave, *For a General, a Tough Mission: Building the Army*, N.Y. Times, Feb. 5, 2006. More importantly, the military has a particular need for Muslim recruits thanks to its ongoing operations in the Middle East, South Asia, and other predominantly Muslim parts of the world. Servicemembers who are familiar with Islamic customs and religious practices help the military demonstrate openness toward non-Christians, while often calling attention to actions that locals might consider inappropriate or disrespectful. See Richard Whittle, *Uncle Sam Wants U.S. Muslims to Serve*, Christian Science Monitor, Dec. 27, 2006. Unfortunately, the military's difficulty in recruiting significant numbers of Muslims makes it less effective in these foreign operations than it otherwise might be.<sup>5</sup>

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<sup>5</sup> Moreover, just as government-endorsed symbols such as the Mojave Cross undermine the efforts of the military to recruit non-Christians, they also undermine to at least some extent efforts by the United States to appeal to Muslims abroad, and thus undermine U.S. foreign policy and national security interests more broadly. Recent scholarship has demonstrated that American engagement with the Muslim world is crucial to combating the narrow and marginal strands of Islam that produce terrorists intent on harming American interests. See Juan Cole, *Engaging the Muslim World* 237 (2009); Emile Nakhleh, *A Necessary Engagement: Reinventing America's Relations With the Muslim World* 82 (2009).

To be fair, the military has made efforts to become more amenable to Muslim recruits, including opening Muslim prayer centers in Quantico, Virginia and West Point and commissioning more Muslim chaplains. See Caryle Murphy, *Military, Muslim Life Meld on U.S. Bases; With the Support of the Top Brass, Islam Becoming More* VporJ0.4104 -a moo -1.2 TD0.5573 Tw[(B

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