

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS  
625 Indiana Avenue N.W., Suite 900  
Washington, D.C. 20004

KATHLEEN EGBERT; PATRICIA  
DARLENE HOWELL CORNEILSON;  
SCOTT STEARNS; AQUARIAN  
TABERNACLE CHURCH; and  
CORRELLIAN NATIVIST CHURCH  
INTERNATIONAL, INC.,

Petitioners,

v.

R. JAMES NICHOLSON, SECRETARY  
OF VETERANS AFFAIRS, in his official  
capacity; WILLIAM F. TUERK, UNDER  
SECRETARY FOR MEMORIAL  
AFFAIRS, in his official capacity; and  
LINDEE LENOX, ACTING DIRECTOR,  
NATIONAL CEMETERY  
ADMINISTRATION'S MEMORIAL  
PROGRAMS SERVICE, in her official  
capacity,

Respondents.

No.

PETITION FOR EXTRAORDINARY RELIEF  
IN THE NATURE OF MANDAMUS

**Introduction**

This petition asks the Court to direct the National Cemetery Administration (NCA) of the Department of Veterans Affairs (VA) to respond to long-pending applications to include the Wiccan Pentacle among the emblems of belief that may be engraved on government-issued headstones and markers of deceased veterans.

For over nine years Wiccan veterans, survivors of veterans, and their clergy have respectfully applied to have their religion recognized in death just as the VA recognizes the faith preferences of other veterans. Throughout this period the agency has refused to act on these requests, but has never rejected them in writing in a form that would allow

appellate review by this Court. In the meantime, while the VA stonewalled Wiccan applications, the agency approved additional emblems of numerous other religions/belief systems as a matter of course, typically within months of the applications.

This discrimination must end. The First Amendment to the United States Constitution and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, prohibit the agency from delivering services to members of some religions while denying them to others. There is only one lawful action that the agency can take in response to the petitions: namely, to grant them. Because the agency has deliberately refused to act, this Court should issue an order in the nature of mandamus directing the agency to act on the pending applications and to grant Petitioners' request.

**I. Statement of Relief Sought**

1. Petitioners seek an Order of the Court requiring the Respondents to comply with the Constitution, laws, and regulations of the United States and to process their application in an expeditious manner. Petitioners further request that the Court's order contain a specific time period in which the Respondents must act, on pain of either contempt or summary grant of the benefit sought by Petitioners. In the alternative, Petitioners request that this Court rule as a matter of law that Petitioners are entitled to the benefit sought and issue an Order directing the Secretary to adopt the Wiccan Pentacle as one of the accepted emblems of belief to appear on government-issued headstones and markers. Finally, Petitioners request an award of costs, attorneys' fees, and any further relief this Court deems appropriate.

## **II. Statement of Facts**

### **A. The Parties**

2. Petitioner Kathleen Egbert is the surviving daughter of Abraham Kooiman. The late Mr. Kooiman was a veteran of World War II and was honorably discharged from the U.S. Army in 1945. He died on December 19, 2002 and was interred in Arlington National Memorial Cemetery on May 22, 2003. Mr. Kooiman was a practicing Wiccan, as was his late wife Rosemary Kooiman, whose remains are interred next to those of Mr. Kooiman. Mrs. Egbert requests that the VA honor her father's religious choice by engraving the Pentagle, the Wiccan emblem of belief, on her father's headstone.

3. Petitioner Patricia Darlene Howell Corneilson is the surviving mother of James W. Price. Mr. Price was killed in action in Iraq on September 18, 2004, while serving in the U.S. Army. Mr. Price was also a practicing Wiccan. Ms. Corneilson has not received a headstone or marker from the VA, choosing to delay receipt until the VA allows Wiccan emblems to be displayed on veterans' headstones or markers.

4. Petitioner Scott Stearns is a retired disabled U.S. Navy veteran, who served in the Persian Gulf War and was honorably discharged in 1997. He has been a practicing Wiccan and member of the Aquarian Tabernacle Church (ATC) since 1996. Mr. Stearns would like the assurance of knowing that upon his death he will be allowed to display the emblem of belief corresponding to his religious affiliation on his headstone or marker.

5. Petitioner Aquarian Tabernacle Church (ATC) is a tax-exempt church formed in 1979 to provide religious services and support to the greater Wiccan community, including Wiccan veterans, like Mr. Stearns. The ATC resides in Index, Washington.

6. Petitioner Correllian Nativist Church International, Inc. (CNCI) is a tax-exempt church formed in 1979 to provide religious services and support to the greater Wiccan community, including Wiccan veterans. CNCI is incorporated in the State of Illinois, and CNCI's offices are located in Albany, New York.

7. Respondent, the Honorable R. James Nicholson, is the Secretary of the Department of Veterans Affairs (VA). The VA, through its National Cemetery Administration (NCA), is responsible for providing government headstones or markers for eligible veterans of the Armed Forces and certain veterans of the reserves, the National Oceanic and Atmospheric Administration, Public Health Service, and the wartime Merchant Marine.

8. Respondent, the Honorable William F. Tuerk, is the Under Secretary for Memorial Affairs and is charged with the management and direction of the NCA, including the provision of headstones or markers to eligible veterans.

9. Respondent, Lindee Lenox, is the Acting Director of the NCA's Memorial Programs Service. Ms. Lenox directly oversees the applications for the inclusion of emblems of belief on the Secretary's list of approved emblems for government headstones and markers.

## **B. The Benefit Sought**

10. The Secretary provides headstones and markers free of charge to mark the graves of eligible veterans, upon application by a veteran or the next of kin of a deceased veteran. These headstones and markers include the full name of the deceased, branch of military service and rank, and dates of birth and death as well as notations of any war

service and medals, if requested and applicable. In addition, upon request, the Secretary will cause an emblem of belief of the deceased veteran to be included on his or her headstone or marker — provided that symbol is on the Secretary’s list of approved emblems.

11. Currently the VA allows 38 emblems of belief to be included on a veteran grave marker.<sup>1</sup> The approved emblems include familiar symbols of mainstream American religions, such as the Christian Cross (in many of its forms), the Jewish Star of David, and the Muslim Crescent and Star. Indeed, there are eighteen different varieties of emblems signifying different denominations within the Christian faith. The approved emblems also include symbols of lesser-known religions, such as Eckankar, Seicho-No-Ie, the Konko-Kyo Faith, and the United Church of Religious Science. There are even symbols for Atheists and secular Humanists.

12. The emblem of belief for the Wiccan religion is the Pentacle, a five-pointed interleaved star within a circle. The circle represents eternity. The five points of the star represent earth, air, fire, water, and a topmost point representing the unifying spirit. The VA will not allow the Wiccan Pentacle to be included on a deceased veteran’s military grave marker.

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<sup>1</sup> Attachment 1 (VA Form 40-1330) and U.S. Dep’t of Veterans Affairs, *Available Emblems of Belief for Placement on Government Headstones and Markers*, available at <http://www.cem.va.gov/cem/hm/hmemb.asp>, provided for the Court’s convenience as Attachment 2.

### **C. Background on the Wiccan Religion**

13. Practitioners of the religion known as Wicca refer to themselves as “Wiccans” and sometimes more generically as “Pagans.” “Wicca is a polytheistic faith based on beliefs that prevailed in both the Old World and the New World before Christianity.” *O’Bryan v. Bureau of Prisons*, 349 F.3d 399, 400 (7th Cir. 2003). Courts consistently have held that “the Church of Wicca occupies a place in the lives of its members parallel to that of more conventional religions. Consequently, its doctrine must be considered a religion.” *Dettmer v. Landon*, 779 F.2d 929, 932 (4th Cir. 1986), *cert. denied*, 483 U.S. 1007 (1987); *see also, e.g., O’Bryan*, 349 F.3d at 400 (holding that Wiccan was entitled to assert claim under Religious Freedom Restoration Act); *Van Koten v. Family Health Mgmt., Inc.* 955 F. Supp. 898, 902 (N.D. Ill. 1997) (applying Title VII to a Wiccan’s religious discrimination claim), *aff’d*, 134 F.3d 375 (7th Cir. 1998).

14. Some members of the public have the misconception that Wicca is related to Satanism, but Wiccans are neither Satanists nor devil worshippers. They do not believe in the concept of Satan, and they strenuously reject forces of evil. To the contrary, Wicca respects those religions that foster honor and compassion in their adherents.

### **D. Governmental Recognition and Accommodation of the Wiccan Religion**

15. There are well over one hundred thousand Wiccans currently living in the United States.<sup>2</sup> Thousands of Wiccans currently serve in the military. For example, the Defense

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<sup>2</sup> One recent survey estimated that there were over 134,000 self-identified Wiccans living in the United States in 2001. *See* Barry Kosmin, et al., *American Religious Identification Survey, Key Findings* (2001), at 3, *available at* [http://www.gc.cuny.edu/faculty/research\\_briefs/](http://www.gc.cuny.edu/faculty/research_briefs/)

Department's internal accounting system indicates that, as of May 2005, there were over 1,800 self-identifying Wiccan members serving in the military.<sup>3</sup> Unlike the VA, the military has long embraced the religious diversity of its members, allowing them to practice whatever form of worship they desire, so long as it does not interfere with their duties or cause a danger to either those practicing or those around them.<sup>4</sup> Since the 1970s Wicca has been included in military chaplain's handbooks,<sup>5</sup> and for decades the military has allowed its members to list Wicca as their religion on military dog tags. Wiccans practice on military bases worldwide.

16. Outside of military circles, as well, Wiccans have enjoyed recognition by other governmental bodies. The Internal Revenue Service first recognized Petitioner ATC as a tax-exempt Church in 1988.<sup>6</sup> Subsequently, in 1991 it granted the ATC Group Exemption umbrella recognition in the Wiccan tradition, thereby allowing other Wiccan Churches to qualify as tax-exempt. Petitioner CNCI obtained official tax-exempt status in 2004, and various other Wiccan churches also enjoy such status.<sup>7</sup> Since the landmark

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aris/key\_findings.htm, included for the Court's convenience as Attachment 3. The survey estimated that there were an additional 140,000 self-described Pagans living in the U.S. in 2001. *Id.* The complete survey, Barry Kosmin, et al., *American Religious Identification Survey* (2001), can be found at [http://www.gc.cuny.edu/faculty/research\\_studies/aris.pdf](http://www.gc.cuny.edu/faculty/research_studies/aris.pdf).

<sup>3</sup> See Leo Shane III, *Wiccans Wait for VA to Allow Symbol on Headstones at National Cemeteries*, Stars and Stripes, Mar. 11, 2006, at 3, included for the Court's convenience at Attachment 4. Because Wicca is sometimes misunderstood and its members may fear discrimination, the actual number of Wiccan service members may be greater.

<sup>4</sup> See Attachment 5 (1998 DOD letter).

<sup>5</sup> Attachment 6 (Army Chaplain Handbook).

<sup>6</sup> Attachment 7 (IRS letters).

<sup>7</sup> See, e.g., Attachments 8 (Isis Fortuna application) and 9 (Kooiman application).

*Dettmer* decision, cited *supra*, federal and some state prison chaplain handbooks contain sections on the Wiccan religion.<sup>8</sup>

#### **E. Petitioners' Applications**

17. But the VA is not so accommodating. No emblems of belief are permitted on government-furnished headstones or markers other than those approved by the Secretary.<sup>9</sup> Because the Secretary has refused to rule on Petitioners' applications, they are neither able to display the Pentacle upon the deceased's gravestone or marker, nor allowed to appeal an adverse decision.

18. Petitioners and other members of the Wiccan community have sought the VA Secretary's approval of the Wiccan Pentacle for use on veterans' headstones or markers for over nine years. Petitioner ATC, through its Archpriest, the Right Reverend Pierre C. Davis, a/k/a Pete Pathfinder Davis, first applied for admission of the Wiccan emblem of belief on August 27, 1997.<sup>10</sup> Rev. Davis identified himself and his position in the Church, gave a brief overview of the Wiccan religion and attached a copy of the Pentacle, the Wiccan emblem of belief, described as a five-pointed, interwoven star enclosed in a circle.

19. Prior to the Rev. Davis' application, the VA had no regulation governing the adoption of such emblems and "additions and revisions to the list" of approved emblems

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<sup>8</sup> See, e.g., Attachment 10 (Inmate Religious Beliefs and Practices: Practice Guidelines for Administration of Inmate Beliefs and Practices (U.S. DOJ Federal Bureau of Prisons Mar. 27, 2002)).

<sup>9</sup> Attachment 1 (VA Form 40-1330).

<sup>10</sup> Attachment 11 (ATC 1997 application).



“were the result of [the VA’s] surveys of religious organizations and periodic monitoring of numbers of requests for particular emblems of belief.”<sup>11</sup>

20. Rev. Davis did not receive a response to his letter until November 27, 2001, when the Secretary wrote to inform him that the VA was currently “revising” its regulations regarding applications for inclusion of new emblems on the list of government approved emblems for military headstones and markers.<sup>12</sup>

21. The Secretary’s letter was incorrect on two counts. First, there were no regulations in place prior to 2001, so it was misleading to refer to a “revision” of prior regulations. Further, by the time the Secretary had sent the letter to Rev. Davis, the review of the proposed regulation was long complete and the VA had already adopted former NCA Directive 3310 (May 9, 2001) six months earlier.<sup>13</sup> The Secretary did not revise his November 27 letter to inform Rev. Davis that the VA had adopted a regulation, nor did he advise Rev. Davis of his right to reapply under the new guidelines. In any case, the new regulation required precisely what Rev. Davis had already provided: a written request signed by a recognized head of the Church, a brief description of the Church, and a camera-ready copy of the requested emblem.<sup>14</sup>

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<sup>11</sup> See, e.g., Attachment 12 (1998 De Meo letter).

<sup>12</sup> Attachment 13 (VA 2001 response to ATC 1997 application).

<sup>13</sup> Attachment 14 (Directive 2001).

<sup>14</sup> Attachment 11 (ATC 1997 application).

22. On December 15, 2003, Rev. Davis again wrote to the VA, reiterating his request that the Secretary take action on the ATC's application.<sup>15</sup> The letter referred the Secretary to entries on Wicca in the Department of Defense Army Chaplain Handbook, the Federal Department of Justice Federal Bureau of Prisons Technical Reference No. T5360.01, [Federal] Inmate and Religious Beliefs and Practices, dated March 27, 2002 as well as the landmark decision, *Dettmer v. Landon*, 617 F. Supp. 592 (E.D. Va. 1985), *aff'd*, 799 F.2d 929, 930 (4th Cir. 1986), in which Wicca was recognized as a religion entitled to First Amendment protection. The VA provided no response to Rev. Davis' letter.

23. On April 22, 2005, Rev. Davis sent a follow-up letter reminding the Secretary of his failure to respond to the ATC letter of December 15, 2003.<sup>16</sup> On May 10, 2005, the Secretary informed Rev. Davis that he had lost the December 15 letter, was revising the VA's guidelines and criteria, and would accept new applications once the revisions had been completed.<sup>17</sup>

24. On January 4, 2005, Petitioner CNCI applied in writing to the VA, requesting that the Wiccan symbol be added to the VA's list of approved emblems for use on veteran's headstones or markers.<sup>18</sup> The VA responded on March 25, 2005, stating that no formal decision had yet been made on CNCI's application and explaining that the VA was in the

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<sup>15</sup> Attachment 15 (ATC 2003 letter).

<sup>16</sup> Attachment 16 (ATC 2005 letter).

<sup>17</sup> Attachment 17 (VA 2005 letter).

<sup>18</sup> Attachment 18 (CNCI application).

process of revising and clarifying its policy.<sup>19</sup> On November 3, 2005, the VA advised CNCI that it had approved a set of revised procedures for adding new emblems of belief to the VA's list.<sup>20</sup>

25. On March 11, 2005, Petitioner Scott Stearns independently applied to the VA requesting that it include a Wiccan symbol among its approved emblems. On May 13, the VA advised Mr. Stearns that it was in the process of reviewing its regulations.<sup>21</sup>

26. Mr. Stearns then filed a Freedom of Information Act (FOIA) request with the Secretary to obtain all documents pertaining to applications for emblems of belief. Mr. Stearns obtained hundreds of highly revealing documents. They affirmed that the ATC petition was not alone and there were several other applications for adoption of the Wiccan Pentacle concurrently pending before the VA.

27. Included among the FOIA documents was the 2004 application of Rosemary Kooiman,<sup>22</sup> mother of Petitioner Kathleen Egbert and High-Priestess of her own Wiccan Church in Maryland, the Nomadic Chantry of the Gramarye. Mrs. Kooiman's husband, Abraham Kooiman, died on December 19, 2002 and was interred in Arlington National Cemetery on May 22, 2003. She learned from the American Legion National Headquarters in Washington, DC, that Pentacle requests were already pending with the Secretary and decided to accept an interim headstone for her late husband without the

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<sup>19</sup> Attachment 19 (VA March 2005 response to CNCI application).

<sup>20</sup> Attachment 20 (VA November 2005 response to CNCI application).

<sup>21</sup> Attachment 21 (Stearns letter and response).

<sup>22</sup> Attachment 9 (Kooiman Application).

Pentacle on it. Mrs. Kooiman accepted the headstone with the expectation that the Pentacle would be inscribed after it had been added to the Secretary's list.<sup>23</sup> In 2006, Mrs. Kooiman appended her Pentacle request for her husband's headstone to the ATC's application.<sup>24</sup> However, Mrs. Kooiman died on March 5, 2006 without her request being fulfilled. Her daughter, Petitioner Egbert, appears before this Court to further that request.

28. The FOIA documents disclosed additional Wiccan requests, including the September 1998 application by Rev. Rona Russell, Priestess of the Isis Invicta Military Mission of the Temple and Lyceum of Isis Fortuna,<sup>25</sup> several applications in 2004 from individuals, as well as the applications in 2005 of the leaders of some of the largest Wiccan churches in the United States, including Rev. Selena Fox, Senior Minister, Circle Sanctuary.<sup>26</sup>

29. Even more revealing was the fact that the VA had approved numerous applications for other emblems of belief, while declining to rule on the Wiccan applications. On July 3, 2002, the Secretary added the emblem of the Christian and Missionary Alliance to his approved list, which became the thirtieth recognized emblem.<sup>27</sup> In August the same year,

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<sup>23</sup> See NCA Directive 3310 (2)(g), Attachment 22 (Directive 2005).

<sup>24</sup> Attachment 23 (ATC 2006 supplemental application).

<sup>25</sup> Attachment 8 (Isis Fortuna application).

<sup>26</sup> Attachment 24 (Circle Sanctuary application and response).

<sup>27</sup> Attachment 25 (Christian and Missionary Alliance application and approval).

the Secretary received the application for the Humanist “Emblem of Spirit,”<sup>28</sup> which it also approved.<sup>29</sup> On June 13, 2003, within eight months of receipt of the request, the Secretary added the United Church of Christ to the approved list—even though the application did not comply with the requirements of the 2001 Directive.<sup>30</sup> The Presbyterian Church, whose Cross already appeared as the fourth emblem number, applied for approval for a *second* emblem on July 2, 2003, and received approval just three months later on October 9, 2003, as the Secretary’s emblem number 33.<sup>31</sup> On January 22, 2004, the Izumo Taishakyo Mission of Hawaii sought approval of its symbol, which the Secretary approved six weeks later on March 3, 2004.<sup>32</sup> The Secretary approved the Soka Gakkai International - USA Buddhist symbol application in three months and added it to the list as emblem number 35 on May 10, 2004.<sup>33</sup>

30. Also in 2004, the VA greatly expedited the approval of the Sikh emblem so that it could be added to the headstone of an Army sergeant killed in combat and buried in Arlington National Cemetery. In less than three months the Sikh symbol became the

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<sup>28</sup> Attachment 26 (Humanist application and approval).

<sup>29</sup> Attachment 1 (VA Form 40-1330) and U.S. Dep’t of Veterans Affairs, *Available Emblems of Belief for Placement on Government Headstones and Markers*, available at <http://www.cem.va.gov/cem/hm/hmemb.asp>, provided for the Court’s convenience as Attachment 2. The Memo approving the Humanist Emblem was not included in the FOIA documents provided to Mr. Stearns.

<sup>30</sup> Attachment 27 (Church of Christ application and approval).

<sup>31</sup> Attachment 28 (Presbyterian application).

<sup>32</sup> Attachment 29 (Izumo Taishakyo Mission of Hawaii application).

<sup>33</sup> Attachment 30 (Soka Gakkai International application).

thirty-sixth recognized emblem of belief.<sup>34</sup> The VA also expedited the inscription of the emblem on the deceased Sikh soldier's headstone in time for his family's visit.<sup>35</sup>

31. Although the Secretary did not include the applications among the FOIA documents provided to Mr. Stearns, at the time the FOIA request was made, the Secretary had also adopted the Christian Scientists' Cross & Crown symbol as emblem number 37, and the Islamic Five-Pointed Star as emblem number 38.<sup>36</sup>

32. On October 5, 2005, the VA revised NCA Directive 3310 – Emblems on Government-Provided Headstones and Markers.<sup>37</sup> The revised directive provided that requests to add emblems of belief not previously approved by the Secretary would be evaluated according to new criteria.

33. Without abandoning its prior application or waiving its right to have its application considered under the pre-regulation standards of 1997, if more lenient, Petitioner ATC submitted an amended application on November 19, 2005, which expressly addressed each of the criteria articulated in the revised NCA Directive 3310.<sup>38</sup>

34. In January 2006, the ATC supplemented its application to include the personal requests of Petitioner Patricia Corneilson and the late Rosemary Kooiman, deceased

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<sup>34</sup> Attachment 31 (Sikh application).

<sup>35</sup> Attachment 31 (Sikh application).

<sup>36</sup> Attachment 1 (VA Form 40-1330) and U.S. Dep't of Veterans Affairs, *Available Emblems of Belief for Placement on Government Headstones and Markers*, available at <http://www.cem.va.gov/cem/hm/hmemb.asp>, provided for the Court's convenience as Attachment 2.

<sup>37</sup> Attachment 22 (Directive 2005).

<sup>38</sup> Attachment 32 (ATC 2005 application).

mother of Petitioner Kathleen Egbert.<sup>39</sup> Mrs. Kooiman had requested a gravestone from the VA while the ATC's application was still pending and accepted a gravestone on behalf of her late husband without an emblem of belief with the understanding that the gravestone would be retrofitted once the Pentacle application had been accepted. Ms. Corneilson's January 2006 request for a gravestone or marker with the Wiccan emblem was a first request. She has declined to accept a government-issued headstone or marker until she is allowed to engrave a Wiccan emblem of belief on her son's military headstone.

35. The Circle Sanctuary also renewed its application in January 2006 with the marker request for deceased church member who was a Korean War veteran, and in February also included the request of Roberta Stewart, widow of Sgt. Patrick Stewart, a veteran of Operation Desert Storm who was killed in action in Afghanistan on September 25, 2005. Like Petitioner Corneilson, Ms. Stewart declined a VA headstone or marker until she is allowed to display a Pentacle on her husband's military headstone or marker.

36. On or about July 5, 2006, Under Secretary William Tuerk told Ms. Stewart and Rev. Fox that the agency intended to revise and re-promulgate its October 2005 regulation, and that the agency would not consider applications, including Petitioners', filed under the 2005 regulation.

37. In part as a result of the federal government's failure to act, the Nevada Office of Veterans' Services recently authorized the creation and installation of a memorial plaque

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<sup>39</sup> Attachment 23 (ATC 2006 supplemental application).

with the Wiccan Pentacle for Sgt. Patrick Stewart, Ms. Stewart's late husband, at the Northern Nevada Veterans Cemetery in Fernley, Nevada.<sup>40</sup> To date, however, the VA still has not approved any of the pending Wiccan applications.

### **III. Reasons Why the Petition Should Be Granted**

38. To prevail on a petition based on agency delay, the petitioner must demonstrate that the alleged delay "is so extraordinary, given the demands and resources of the Secretary, that the delay amounts to an arbitrary refusal to act, and not the product of a burdened system." *Costanza v. West*, 12 Vet. App. 133, 134 (1999). The exhibits submitted by the Petitioners provide ample evidence that the Secretary's nine-year delay is not the result of an overburdened system but of the VA's *conscious neglect* of its statutory duties. As evident from the attached documents, from 1997 through the present, the VA received requests from numerous Wiccan groups requesting the Secretary to adopt the Wiccan Pentacle. While the Petitioners' and other Wiccan groups' applications were still pending, the Secretary adopted two successive directives governing the acceptance of emblems in 2001 and 2005 respectively, but declined to apply either directive to Petitioners' long-standing application. The VA can and has decided requests for emblems representing other belief systems within a reasonable time, often in a matter of months. In the same nine-year time period in which the Wiccans have awaited the Secretary's decision, the VA has adopted at least six other emblems and rejected several

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<sup>40</sup> Sean Whaley, *Solider Will Get Wiccan Symbol on Memorial Plaque*, Las Vegas Review-Journal, Sept. 14, 2006, provided for the Court's convenience as Attachment 33.



others. The Secretary's evident refusal to respond to Petitioners' application can be seen as nothing other than an arbitrary refusal to act.

39. The Administrative Procedure Act (APA) directs federal agencies to resolve matters presented to them "within a reasonable time." 5 U.S.C. § 555(b). The Secretary's untoward delay in this matter flouts his statutory obligations and the needs of the people he is intended to serve.

40. On its face, the VA's policy prohibiting Wiccan veterans to display their religious affiliation on their headstones or markers violates the Free Speech and Establishment Clauses of the First Amendment, as well as the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb (1993).

41. The agency's actions violate the Free Speech Clause because the agency imposes viewpoint preferences on the speech of veterans and their families within a forum otherwise made available for such speech. The agency's rules mean that expressions of religion are allowed on veteran headstones if those expressions represent the views of the Secretary's 38 pre-approved belief systems, but not of the expressions of the Wiccan viewpoint. The Free Speech clause forbids governmental censorship of particular religious viewpoints within government-sponsored fora. *Good News Club v. Milford Central Sch. Dist.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

42. The VA's policy is also inconsistent with the Establishment Clause of the First Amendment. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S.

228, 244 (1982). As Justice O'Connor explained in her influential concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984), governmental endorsement of religion "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." Here, the Secretary is sending an unmistakable message that Wicca is a disfavored religion, as compared to a selected list of officially approved religions.

43. The "Establishment Clause . . . commands a separation of church and state," while the "Free Exercise Clause[] requires government respect for, and non-interference with, the religious beliefs and practices of our Nation's people." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). The history of the Establishment Clause shows that its promise of religious liberty extends to Pagan and other non-Christian religions. When the North Carolina assembly debated adoption of the Federal Constitution in North Carolina, founding father and future Supreme Court Justice James Iredell stated: "[I]t is objected that the people of America may perhaps choose representatives who have no religion at all, and that Pagans and Mahometans may be admitted into offices. But how is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for?" *Torcaso v. Watkins*, 367 U.S. 488, 495 n. 10 (1961).

44. The Religious Freedom Restoration Act (RFRA) provides that the federal government "shall not substantially burden a person's exercise of religion . . . except . . . if it [the government] demonstrates that application of the burden to the person is in

furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1. Displaying a Cross, a Star of David or any other emblem of religious belief on a gravestone or marker is a long-held tradition in the United States and serves as a means of professing the faith of the deceased. Forbidding some veterans from displaying an emblem representing their religious beliefs on their headstones or markers greatly burdens the free exercise of religion of veterans and their families. The Secretary has not demonstrated a compelling governmental interest, nor that his policy is the least restrictive means of furthering such interest.

#### **IV. Inadequacy of Alternative Means to Obtain the Relief Sought**

45. Petitioners have not used this writ as a substitute for the appeals process. Petitioners have no means to appeal a decision that the Secretary has deliberately declined to issue. Petitioners have provided all information requested by the Secretary and have periodically reminded him of their pending application. The Secretary’s neglect or refusal to act under these circumstances justifies this Court’s exercise of its mandamus power to grant the relief requested.

RESPECTFULLY submitted this 29<sup>th</sup> day of September 2006.

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*Counsel for Petitioners*

## **Certificate of Service**

I, Daniel Mach, certify under penalty of perjury under the laws of the United States that on the 29<sup>th</sup> day of September, 2006, I served a copy of the Petition for Extraordinary Relief in the Nature of Mandamus to all Respondents listed below by first-class mail with postage pre-paid.

R. James Nicholson  
Secretary of Veterans Affairs  
Representative: General Counsel of the Department of Veterans Affairs  
General Counsel (027)  
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