

To:

Regulations Management (00REG)  
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**Submitted in response to RIN 2900-AM53-Headstone and Marker Application Process  
COMMENTS ON PROPOSED RULE BY DEPARTMENT OF VETERANS AFFAIRS 38 CFR PART 38**

by

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3/3/2007 5:33 PM

**GENERAL**

The United States Constitution prevents the government from encroaching on the free exercise of religion, and from sponsoring, supporting, or actively involving itself with a particular religion or religion in general. Consequently, in the United States, there can be no state-sponsored, supported, or mandated religion. Neither can there be any kind of government-imposed control on any type of religious belief (or non-belief). Nor can there be any discrimination against any individual or group on the basis of religion. The proposed procedures are a violation of our fundamental rights to freedom of religion.

The proposed procedures are vague enough to permit the VA to continue select, without mandatory and objective criteria, the symbols that it will authorize and which it will reject -- leaving ample opportunity for its continued religious discrimination. The VA has demonstrated a pattern of such discrimination by not approving the Wiccan Pentacle for over nine years, while approving the symbols of six other religions and belief systems during this time -- including approving the Sikh emblem in just a few weeks. Quoting Selena Fox of Circle Sanctuary: "Other federal government agencies, including the U.S. Department of Justice and the Department of Defense, have accommodated the Wiccan religion along with other religions and belief systems for decades." Even when all the criteria in the proposed regulations have been met, the Pentacle (a Wiccan symbol) has been disallowed--while the emblems of other obscure faiths have been recognized. This clearly demonstrates that the government can not be trusted to implement the proposed rules in a manner free of religious discrimination.

In addition, the VA's unsuccessful attempt, immediately after proposing these rules, to use the proposal to delay the litigation over the pentacle suggests that the proposal was designed to be an excuse to delay the approval of that emblem.

The proposed rules deny the right of enlisted soldiers and veterans to specify the emblem that most represents their belief system before their death. Furthermore, requiring that the emblem of belief be associated with an organization or group denies the right of individuals who follow their own beliefs to specify their own emblem of belief --something that:

- \* Is easily possible without significant expense, given today's technology
- \* Removes the government from the process of determining which beliefs and associated emblems are frivolous or genuine and interfering with the free expression of beliefs by soldiers, veterans, their next of kin and designated representatives, as well as associated litigation

The establishment of a list of VA approved symbols is an unnecessary procedure that:

- \* Provides continued opportunity for its administrators to discriminate against the religious beliefs of soldiers and their next of kin directly by denying the approval their emblems, as well as by delaying decisions on requests for approval of specific emblems for unlimited amounts of time (as has been demonstrated by the failure of the VA to approve the Wiccan Pentacle for over nine years)..
- \* Prevents soldiers, veterans, their next of kin, etc. from easily arranging for an emblem that they specify as

fitting their beliefs to be quickly placed on their tombstone and/or plaque

- \* Creates unnecessary paperwork, bureaucracy, and burdens on the public and the government
- \* Wastes public and private funds, both in its implementation and in the cost of litigation that is occurring and that will occur if the proposed rules are promulgated
- \* Violates the Constitution of the United States and associated case law and legislation

The cost of administering and legally defending the proposed procedure is far in excess of the cost of providing the necessary flexibility to allow any reasonably simple emblem of belief specified by a soldier, their next of kin or designated representative to be inscribed on their memorial.

- \* Contact with West Memorials and Granite Industries of Vermont (a VA headstone contractor) has revealed that inscriptions on headstones are routinely cut using computer generated stencils that can include any simple emblem of belief (provided in hard copy or common electronic format) with the extra labor ranging from negligible (for a single layer symbol) to up to two hours -- depending on how sophisticated the layering of the symbol is.
- \* According to West Memorials, the cost of adding a simple new emblem of to an individual bronze plaque is \$300 using simple manual procedures. Large scale automation could reduce this cost. In addition, much more sophisticated inscriptions (of photographic quality) are available from Matthews Bronze (a VA contractor) and others.
- \* The VA has a pay-one-price arrangement with the contractors who supply them with headstones, markers and plaques. Current VA requisitions include provisions that permit the addition of new symbols at no additional cost to the VA.

Given today's automation, no credible legal, administrative, or economic justification exists for the VA not allowing soldiers, veterans, their next of kin, or their designated representative to specify any reasonably simple emblem of belief to be inscribed on their gravestone and/or plaque (that is free of copyright restrictions or for which copyright permission has been granted for use on memorials).

Quoting Selena Fox of Circle Sanctuary: "It is a blatant violation of the U.S. Constitution for the U.S. Department of Veterans Affairs to pick and choose what religions and belief systems it will accommodate in the production of headstones, markers and plaques for veterans."

## **COMMENTS ON SPECIFIC PORTIONS OF PROPOSED RULES (CITING FEDERAL REGISTER/VOL 72 No.12 / FRIDAY, JANUARY 19, 2007/):**

**Page 2481, first column, end of second paragraph, states:**

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VA does not provide inscription of emblems identifying the decedent's affiliation with social, cultural, ethnic, fraternal, trade, professional, or military groups.

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**and Page 2483, second column, 38.632, Part (b)(1):**

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(1) Affiliated organization refers to an organization that practices the system of beliefs that were held by a deceased eligible individual and that has a religious purpose. The term "religious purpose" includes a purpose that appears to be secular, but which nevertheless assumes the functional significance of a religious purpose. This term does not refer to any organization representing or affiliated with social, cultural, ethnic, fraternal, trade, professional, or military groups

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In a 1995 Army War College Publication, Gregory C. Sieminski, an Army officer, said the Pentagon decision to call the 1989 invasion of Panama "Operation Just Cause" initiated a trend of naming operations "with an eye toward shaping domestic and international perceptions about the activities they describe." Most gravestones for troops killed in Iraq or Afghanistan at Arlington National Cemetery are inscribed with the slogan-like operation names the Pentagon selected to promote public support for the conflicts, such as "Operation Enduring Freedom" or "Operation Iraqi Freedom". For further details, see the article "Pentagon adds war slogans to dead soldiers' tombstones" by David Pace, Associated Press, Aug. 23, 2005

This provides a clear precedent for soldiers, their next of kin, or designated representatives selecting any emblems on their memorials with the intent of shaping perceptions about their activities, affiliations, and beliefs.

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**Page 2482, Column 1 paragraphs 4 states:**

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Requests for new emblems of belief would only be accepted from the decedent's next-of-kin or personal representative. VA would not accept requests from organizations independently seeking the addition of a new emblem of belief.

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**and Page 2483, second column, 38.632, Part (b)(2) states:**

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(2) Applicant refers to the next of kin or personal representative of the deceased eligible individual who applies for a Government-furnished headstone or marker.

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This denies the right of living soldiers and veterans to specify their own emblem of belief.

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**Page 2483, second column, 38.632, Parts (b)(3) and (b)(4) state:**

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(3) Belief system refers to a genuine and non-frivolous group of religious opinions, doctrines, and/or principles believed or accepted as true by a group of persons. This term includes a belief system that appears to be secular, but which nevertheless assumes the functional significance of a religion in the lives of a group of persons.

(4) Emblem of belief refers to an emblem that represents the belief system of the decedent. It does not include social, cultural, ethnic, fraternal, trade, professional, or military emblems, or any emblem that is obscene or would have an adverse impact on the dignity and solemnity of cemeteries honoring those who served the Nation.

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Requiring that a belief system be believed or accepted as true by a group of people rather than an individual (in the context of defining an emblem of belief and in the proposed regulations) is a violation of the US Constitution and associated case law.

Free exercise of religion is protected throughout the United States. **The belief or practice need not be part of an organized religion or sect**, and the belief need not even include a belief in Deity. Thus, non-traditional religions--including **individualistic religions**, indigenous religions, polytheism, secular humanism, agnosticism, and atheism--are all protected to the same degree as traditional organized monotheistic religions. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S.Ct. 2217 (1993); *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829 (1989); *Callahan v. Woods*, 658 F.2d 679 (9th Cir. 1981). Courts will not judge the truth or

falsity of any belief or doctrine. U.S. v. Ballard, 322 U.S. 78 (1944).

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**Page 2481, first column, third paragraph, states:**

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On occasion, an applicant will request an emblem of belief that is not currently available for inscription. Proposed Sec. 38.632(g) would establish criteria for evaluating a request to add a new emblem of belief to the list currently available for inscription. These criteria are necessary to ensure that: there is an immediate need to inscribe the proposed new emblem of belief on a new, first headstone or marker based on the death of an eligible individual, unless good cause is shown for an exception; the emblem meets the technical production requirements in proposed Sec. 38.632(e)(7); and the affiliated organization does not promote or engage in activity that is illegal or contrary to clear public policy. These criteria also will ensure that the emblem is endorsed by a recognized authority or governing body of the affiliated organization representing a genuine and non-frivolous belief system and that the affiliated organization provides all of the information that VA needs to determine whether an emblem should be made available for headstone and marker inscriptions.

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When an immediate need exists to add a proposed new emblem, modern technology can provide it immediately. The proposed bureaucratic procedures for approving a new emblem, without any time limit for making a decision, clearly stands in the way of meeting such an immediate need.

In addition, requiring an immediate need could be used as an excuse to deny Wiccan families that have been waiting for years to have pentacle added to the headstone the opportunity to receive a properly marked headstone.

Furthermore, requiring that an emblem is endorsed by an organization is a clear violation of the US Constitution and associated case law.

Free exercise of religion is protected throughout the United States. The belief or practice need not be part of an organized religion or sect, and the belief need not even include a belief in Deity. Thus, non-traditional religions--including individualistic religions, indigenous religions, polytheism, secular humanism, agnosticism, and atheism--are all protected to the same degree as traditional organized monotheistic religions. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S.Ct. 2217 (1993); *Frazer v. Illinois Dept. of Employment Security*, 489 U.S. 829 (1989); *Callahan v. Woods*, 658 F.2d 679 (9th Cir. 1981). Courts will not judge the truth or falsity of any belief or doctrine. U.S. v. Ballard, 322 U.S. 78 (1944).

Free exercise of religion is protected by the First Amendment from intentional encroachment by the government under all circumstances. The government may not single out religion or a particular religion for the imposition of special burdens unless the law or governmental decision is the least restrictive means of furthering a compelling governmental interest. The same compelling interest test applies under the First Amendment when the government inadvertently encroaches on religious exercise through neutral and generally applicable laws but results in substantial burdening of religious exercise. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, supra; *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

The United States Supreme Court has interpreted the Non-Establishment Clause (also known as the Establishment Clause) of the First Amendment to prohibit official sponsorship of, support of, or active involvement in, religious activity. The Non-Establishment Clause promotes religious freedom in the United States by limiting the influence of federal, state, and local governments on religious thought and practice, whether the influence originates in the legislative, executive, or judicial branch of government. This clause recognizes the right of an individual or group

to be free from laws and governmental decisions which aid one religion, aid all religions, or prefer one religion over another. See *Walz v. Tax Commission*, 397 U.S. 664 (1970); *Everson v. Board of Education*, 330 U.S. 1 (1947).

A law or governmental decision which operates to discriminate against a religion--including a non-traditional religion—violates the Equal Protection and Non-Establishment Clauses. See *Larson v. Valente*, 456 U.S. 228 (1982).

To pass constitutional muster, the law or decision must meet the following requirements: (1) It must have a legitimate secular purpose, (2) its principle effect must be one that neither advances nor inhibits a particular religion or religion generally, and (3) it must not foster excessive government entanglements with religion. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The proposed rules foster excessive entanglements with religion.

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**Page 2483, , 38.632, Parts (d) the table near the bottom of the page concerning the emblem of belief application requires the applicant to:**

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Arrange for an affiliated organization, as defined in paragraph (b)(1) of Sec. 38.632 to provide the supplemental information specified in paragraph (e) of Sec. 38.632 to the Director of Memorial Programs

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As previously stated, requiring that application be associated with an organization is a violation of the US Constitution and associated case law.

Free exercise of religion is protected throughout the United States. **The belief or practice need not be part of an organized religion or sect**, and the belief need not even include a belief in Deity. Thus, non-traditional religions--including **individualistic religions**, indigenous religions, polytheism, secular humanism, agnosticism, and atheism--are all protected to the same degree as traditional organized monotheistic religions. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S.Ct. 2217 (1993); *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829 (1989); *Callahan v. Woods*, 658 F.2d 679 (9th Cir. 1981). Courts will not judge the truth or falsity of any belief or doctrine. *U.S. v. Ballard*, 322 U.S. 78 (1944).

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**Page 2481, third column, second paragraph, states:**

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In our view, the IRS criteria for determining whether an organization is a church for Federal income tax purposes may be helpful in determining whether an emblem of belief represents a genuine and not frivolous belief system and should be available for a VA Government-furnished headstone and marker inscription. If the IRS has determined that a group holding a particular belief system is a church under the Internal Revenue Code, we believe that determination should be one of the factors that VA considers in reviewing requests to add a new emblem of belief to the current list of emblems available for inscription on Government-furnished headstones and markers.

Accordingly, in Sec. 38.632(g)(2), we propose to state that VA will consider whether the IRS has issued a determination letter to an affiliated organization recognizing the organization as exempt under section 501(c)(3) of the Internal Revenue Code and classifying it as a church for purposes of sections 509(a)(1) and 170(b)(1)(A)(i) of the Code. We also propose to consider whether an affiliated organization that has not sought an IRS determination of its status under section 501(c)(3) appears to have the characteristics generally attributed to churches under IRS guidelines. Under proposed Sec. 38.632(e), affiliated organizations will be required to address these factors and provide supporting documentation when endorsing an applicant's request for a new emblem of belief.

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**and Page 2483 (below the table) and Page 2484 (first column) 38.632, Part (e) requires numerous related details, including**

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e) Supplemental information from the affiliated organization. The supplemental information provided by the affiliated organization must identify the deceased eligible individual for whom a request has been made to add a new emblem to VA's list of emblems of belief available for inscription on Government-furnished headstones and markers. The supplemental information submitted by an affiliated organization also must include the following:

(1) A signed letter from a recognized authority, board of directors or equivalent governing body, for the affiliated organization certifying that:

(i) The proposed new emblem of belief is widely used and recognized as the symbol of a distinct belief system; and

(ii) The affiliated organization endorses adding the emblem to VA's list of emblems of belief available for inscription on Government-furnished headstones and markers.

(2) A copy of an IRS determination letter, if available, recognizing the affiliated organization as exempt under section 501(c)(3) of the Internal Revenue Code and classifying it as a church under sections 509(a)(1) and 170(b)(1)(A)(i) of the Code.

(3) If the organization has not applied for tax-exempt status, a statement explaining the extent to which the organization otherwise meets the characteristics generally attributed to a church by the Internal Revenue Service (IRS), as described in paragraph (g)(10)(ii) of this section.

(4) A concise written description of the main tenets of the affiliated organization's belief system.

(5) Information about the structure of the affiliated organization, including the locations of congregations or other religious membership groups that comprise the affiliated organization.

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**and Page 2484 (second column) 38.632, Part (g) requires numerous related details, including**

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(g) Evaluation criteria. The Director of NCA's Office of Field Programs shall forward to the Under Secretary for Memorial Affairs the request, any pertinent records or information, and the Director's recommendation after evaluating whether:

(1) The emblem represents a belief system, as defined in paragraph (b)(3) of this section.

(2) The emblem meets the definition of an emblem of belief, as defined in paragraph (b)(4) of this section.

(3) There is an immediate need to inscribe the emblem on a new, first, Government-furnished headstone or marker for a deceased eligible individual, unless good cause is shown for an exception.

(4) The emblem is endorsed by an affiliated organization, as defined in paragraph (b)(1) of this section.

(5) The affiliated organization endorsing the emblem does not promote or engage in any activity that is illegal or contrary to clear public policy.

(6) The letter provided under paragraph (e)(1) of this section is from a recognized authority, board of directors, or equivalent governing body of the belief system represented by the emblem.

(7) The emblem meets the technical requirements for inscription specified in paragraph (e)(7) of this section.

(8) The affiliated organization provided all of the supplemental information listed in paragraph (e) of this section.

(9)(i) The IRS has determined that the affiliated organization is exempt under section 501(c)(3) of the Internal Revenue Code and is classified as a church under sections 509(a)(1) and 170(b)(1)(A)(i) of the Code; and,

(ii) If the affiliated organization has not applied to the IRS for recognition of tax-exempt status, whether the organization has characteristics generally attributed to a church, such as: a distinct legal existence, a recognized creed and form of worship, a definite and distinct ecclesiastical government, a formal code of doctrine and discipline, a distinct religious history, a membership not associated with any other church or denomination, an organization of ordained ministers, ordained ministers selected after completing prescribed courses of study, a literature of its own, established places of worship, regular congregations, regular religious services, schools for the religious instruction of the young, and schools for the preparation of its ministers.

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Requiring that the supplemental information be provided by and an organization is a violation of the US Constitution and associated case law for previously stated reasons.

Furthermore, many organizations and individuals do not apply for IRS tax exemption for their religious income and expenses because of the huge burden of detailed paperwork required for such a determination, along with associated costs and the low tax benefit of deducting their associated income and expenses. The proposed rules have the effect of discriminating against small religious groups and individual beliefs by imposing an undue burden of paperwork to arrange for their emblems to be inscribed on government provided memorials.

In addition, the atheist emblem (that the VA already approved) would not meet all of the proposed criteria.

As previously mentioned, free exercise of religion is protected from intentional encroachment by the government under all circumstances. The government may not single out religion or a particular religion for the imposition of special burdens unless the law or governmental decision is the least restrictive means of furthering a compelling governmental interest. The same compelling interest test applies under the First Amendment when the government inadvertently encroaches on religious exercise through neutral and generally applicable laws but results in substantial burdening of religious exercise. No compelling interest has been demonstrated for imposing the proposed procedures; nor are the proposed rules the least restrictive.

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**Page 2481, third column, last paragraph, to first paragraph of Page 2482, states:**

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Using the evaluation criteria proposed in Sec. 38.632(g) will ensure that available emblems represent only genuine and not frivolous belief systems and that the practices and rites associated with the belief system are not illegal or contrary to clear public policy. Establishing procedures and criteria for the inscription of emblems in this manner will help ensure that VA effectively administers the headstone and marker program, efficiently produces headstones and markers upon request, and fulfills its obligation maintain VA's cemeteries as national shrines. >>

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The proposed procedures are a time consuming, bureaucratic obstacle to the VA efficiently producing headstones and markers and administering its program.

The proposed procedure has the effect the VA requiring a written description of religious tenants and determining whether or not a belief is genuine or frivolous. Case law establishes that courts will not judge the truth or falsity of any belief or doctrine. U.S. v. Ballard, 322 U.S. 78 (1944). If courts can not do this, the VA has no business doing this also.

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**Page 2482, Column 1, second paragraph, second sentence states:**

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Under proposed Sec. 38.632, the process for requesting a new emblem of belief varies based on the place of burial or memorialization. When burial or memorialization is in a Federally-administered cemetery or a State veterans cemetery that uses the NCA electronic ordering system, an applicant must submit a written request to the cemetery director for a headstone or marker bearing a new emblem of belief.

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**and Page 2483, third column, 38.632, Part (c) states:**

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(c) Headstone and marker application process.

(1) Headstones or markers will be ordered automatically during the process of arranging burial or memorialization

for a deceased eligible veteran or eligible family member in a national cemetery or a State veterans cemetery that uses the NCA electronic ordering system. Cemetery staff will order a Government-furnished headstone or marker by entering information received from the applicant directly into the NCA electronic ordering system. No further application is required to order a Government-furnished headstone or marker when the cemetery uses the NCA electronic ordering system.

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The NCA ordering system could be set-up to allow the submission of suitably formatted emblems of belief in GIF, JPG and other common electronic formats, and include an extensive catalog of emblems, to more fully automate their addition to memorials.

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**Page 2484, first column, 38.632, Part (d)(7) states:**

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(7) A three-inch diameter digitized black and white representation of the requested emblem that is free of copyright restrictions and can be reproduced in a production-line environment in stone or bronze without loss of graphic quality.

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This appears to be reasonable. However, to avoid confusion, please consider explicitly stating that copyrighted emblems are allowed if the owner of the copyright certifies to the VA, in writing, that it can be used, without restrictions, on VA memorials and in the NCA ordering system.

It may also be worthwhile to provide specifications stating minimum technical requirements for assuring that it can be reproduced in a production-line environment -- in consultation with VA headstone and plaque contractors.

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**Page 2482, Column 1, second paragraph, third sentence states:**

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The applicant must also arrange for an affiliated organization to endorse the proposed new emblem of belief as representative of the belief system and to submit the supplemental information specified in proposed Sec. 38.632(e). When burial or memorialization is in a private cemetery or other cemetery that does not use the NCA electronic ordering system, the applicant must request a new emblem of belief in the Remarks section of VA Form 40-1330. This applicant must also arrange for an affiliated organization to endorse the proposed new emblem of belief as representative of the belief system and to submit the supplemental information specified in proposed Sec. 38.632(e).

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Besides requiring the endorsement of an organization, in violation of the Constitution and associated case law, the VA does not have the right to impose this burden on soldiers, veterans, their families, organizations, or designated representatives. It has the unconstitutional effect of finding individual, unusual and non-mainstream religions and sincere beliefs guilty of not being legitimate until proven otherwise and imposes an unnecessary burden -- in violation of pertinent case law.

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**Page 2482, column 1, second sentence, states:**

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VA intends to preclude the addition of any emblem that would have an adverse impact on the dignity and solemnity of cemeteries honoring those who served the Nation

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**and Page 2483, second column, 38.632, Part (b)(4) states:**

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(4) Emblem of belief refers to an emblem that represents the belief system of the decedent. It does not include social, cultural, ethnic, fraternal, trade, professional, or military emblems, or any emblem that is obscene or would have an adverse impact on the dignity and solemnity of cemeteries honoring those who served the Nation.

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The VA not approving the emblems of belief of individuals and small groups without an undue administrative burden adversely impacts the dignity and solemnity of cemeteries intended to honor all who served the nation, including those with independent beliefs. Evidence for this is provided in: **Page 2482, column 1, last paragraph and the first and second paragraphs of column 2, which states:**

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If a new emblem of belief request is received for a deceased eligible individual interred or memorialized in a Federally-administered cemetery or a State veterans cemetery, VA would furnish a headstone or marker without an emblem of belief to mark the grave while the request is being processed. If the requested emblem of belief is subsequently added to VA's list of emblems, VA would furnish a replacement headstone or marker that bears the new emblem of belief.

If a request for inscription of a new emblem of belief is received for a deceased eligible veteran interred or memorialized in a private cemetery, the applicant would be able to request that VA furnish a headstone or marker without an emblem to mark the grave while the request is being processed (with the option to replace the headstone or marker if the emblem is made available) or may choose to delay delivery of a headstone or marker to mark the grave until a decision is made. >>

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**Page 2482, Column 2, Paperwork Reduction Act and Column 3, Regulatory Flexibility Act:**

The proposed rule imposes a significant paperwork burden on both the VA and an unknown number of individuals and organizations. No evidence was provided to document that it would affect fewer than ten entities within any 12 month period.

Furthermore, as previously mentioned, to pass constitutional muster, the law or decision must meet the following requirements: (1) It must have a legitimate secular purpose, (2) its principle effect must be one that neither advances nor inhibits a particular religion or religion generally, and (3) it must not foster excessive government entanglements with religion. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The proposed rules foster excessive entanglements with religion. They also impose disproportionate and unnecessary burdens on individual and small group religions and beliefs to have their emblems on government provided memorials.

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**Page 2484, first column, 38.632, Part (f) states:**

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(f) Incomplete supplemental information provided by an affiliated organization. If VA determines that a request to add a new emblem of belief is incomplete, VA will notify the applicant in writing of any missing information and that he or she has 60 days to submit such information or no further action will be taken. If the applicant does not submit all required information or demonstrate that he or she has good cause for failing to provide the

information within 60 days of the notice, then the applicant will be notified in writing that the request for a new emblem of belief will be deemed withdrawn and no further action will be taken.

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The proposed rules do not state any limit to the amount of time that the VA can hold an application without making a decision the completeness of the application or on whether or not to accept the emblem. The proposed rules do not even require that the VA make a decision. This would allow the VA to discriminate against religious beliefs by never making a decision on its emblem of belief -- as demonstrated by its continuing failure for over nine years to make a decision on the Wiccan pentacle.

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**Page 2484, third column, 38.632, Part (h) states:**

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(h) Decision by the Under Secretary for Memorial Affairs. A request to add a new emblem to VA's list of emblems of belief available for inscription on Government-furnished headstones and markers shall be granted if the Under Secretary for Memorial Affairs finds, by a preponderance of the evidence, that the request meets each of the criteria in paragraphs (g)(1) through (7) of this section. In making that determination, the Under Secretary shall consider the Director of NCA's Office of Field Programs' recommendation and may consider information from any source. The Director of Field Programs will provide the individual who made the request written notice of the decision of the Under Secretary for Memorial Affairs. The decision of the Under Secretary for Memorial Affairs is final. (Authority: 38 U.S.C. 501, 2404)

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Denying the legitimacy of a religion, belief, or emblem based on information from any source allows numerous opportunities for misinformation, religious prejudice and corruption to enter into the process. For example, various groups compete for federal funding, and some may do their best to undermine the legitimacy of any application by a competing group or belief system. The VA should not have the right to consider such information, and any information that it receives from any source other than the applicant that could have an adverse impact on its decision should be promptly identified to the applicant, along with its source.

To avoid such entanglements, as well as legal issues related to freedom of religion, any three inch diameter emblem that can be reproduced in a production line environment in stone or bronze without loss of graphic quality that is free of copyright restrictions should be allowed.

Furthermore, once the VA makes a decision, it is final -- with no designated procedure for appeal. The lack of an appeal process will result in disputes that might have been solved through prompt and appropriate administrative procedures to be resolved in court, at considerable cost to all involved parties.

## **ADDITIONAL LEGAL CONSIDERATIONS**

The First Amendment to the United States Constitution provides: "Congress shall pass no law respecting an establishment of religion, or prohibiting the free exercise thereof..." U.S. Const. amendment I. It guarantees the free exercise of religion and ensures that the federal government will comply with the non-establishment principle. See U.S. Const. art. VI, sec. 2.

The Fourteenth Amendment Equal Protection Clause protects against discrimination by state and local governments on the basis of religion and other beliefs, as well as on the basis of ethnicity and gender. The Fourteenth Amendment says: "No state shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. This same prohibition applies to the federal government via the Due Process

Clause of the Fifth Amendment. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

Under the Equal Protection Clause, a law or governmental decision that discriminates on the basis of a fundamental right, such as freedom of religion, is subject to strict scrutiny by the courts. To pass strict scrutiny, the law or decision must constitute a narrowly-tailored means to meet a compelling governmental interest. See *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

The 1964 Civil Rights Act compels employers to accommodate the religious practices of their employees. The provision of a government issued headstone, plaque or marker is an employee benefit and subject to this act.

The United States is a multi-faith society in which all the world's religions are practiced. Freedom to practice all these religions is constitutionally guaranteed. Under the US constitution and associated legislation, no religion has official preference or support from any governmental entity in the United States. Discrimination on the basis of religion is illegal. Each person may believe and express those beliefs according to his or her own conscience without any support or hindrance from the government. The proposed rules would be a hindrance to such expression.

The Civil Rights Act of 1871 provides a remedy for individuals denied their First or Fourteenth Amendment rights. See 42 U.S.C. 1983. Section 1983 states:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Actions "under color of state law," within the meaning of Section 1983, may be perpetrated by federal, state, or local officials. However, some officials, such as judges, enjoy either absolute or qualified immunity. See *Bradley v. Fisher*, 80 U.S. 335 (1972). Other officials enjoy qualified immunity only. See *Burns v. Reed*, 500 U.S. 478 (1991). Such immunity will not be afforded where an official has violated clearly established statutory or constitutional rights under circumstances in which a reasonable person would have known of the existence of the rights and of the violation. See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Section 1983 can be invoked in private suits before the United States federal courts to address religious discrimination claims. The most common relief under Section 1983 is money damages, subject to the limitations of official immunity. Injunctive relief is also available and is widely used to provide relief under Section 1983. See *Brotherhood of Carpenters and Joiners of America, Local 610, AFL-CIO v. Scott*, and 463 U.S. 825 (1983).

Sincerely,

Claude Lawrence Cornett, Jr.

cc

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