

Nos. 08-56415 & 08-56436

**UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT**

JEWISH WAR VETERANS; STEVE TRUNK; et al.,
Plaintiffs/Appellants

vs.

CITY OF SAN DIEGO; et al.,
Defendants/Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
HON. LARRY ALAN BURNS
CIVIL NOS. 3-06-cv-01597-LAB; 3:06-cv-01728-LAB

**CONSENT BRIEF OF *AMICI CURIAE* REAR ADMIRAL JEREMIAH
DENTON, USN (RET.), SYBIL MARTINO, ROBERT MARTINO, AND
JULIE BLOOMFIELD IN SUPPORT OF APPELLEES AND
AFFIRMANCE**

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*

All parties have consented to the filing of this *amici-curiae* brief. Fed. R. App. P. 29.

Amicus Curiae Jeremiah A. Denton is a retired U.S. Navy Rear Admiral, a veteran of World War II, Korea, and Vietnam, a former prisoner of war (“POW”) from July 18, 1965 to February 13, 1973, and a former U.S. Senator from the State of Alabama.

Admiral Denton first came to the attention of the American public during a television interview arranged by his North Vietnamese captors in 1966. Expected to give “proper responses” to a journalist’s recitation of alleged American war atrocities, Admiral Denton affirmed his faith in his government’s position, stating, “I will support it as long as I live.” While responding to questions from his interrogator, Admiral Denton blinked his eyes in Morse Code, repeatedly spelling out the covert message “TORTURE.” His message was the first confirmation that American POWs were being mistreated.

During his nearly eight years as a POW, Admiral Denton was subjected to severe torture. He became the first American military captive to be subjected to four years of solitary confinement. Admiral Denton’s extraordinary account of his endurance and sacrifice for our country while imprisoned in North Vietnam was told in his 1976 book, *When Hell Was in Session*.

After his release in 1973, Admiral Denton continued his military career, ultimately achieving the rank of Rear Admiral. Upon retirement from the Navy, Admiral Denton was elected to the U.S. Senate, becoming the first Republican ever elected by the popular vote to represent Alabama.

In 2008, Admiral Denton's incredible sacrifice for our country—a horrific sacrifice that is unimaginable to most Americans, including most war veterans—was honored and memorialized at the Mt. Soledad Veterans Memorial in San Diego, California. A plaque in his honor was placed at the veterans' memorial during a ceremony held on September 19, 2008, the 2008 National POW/MIA Recognition Day.

In 1973, during the well-televised arrival of the American POWs at Clark Air Force Base in the Philippines, Admiral Denton, a senior officer aboard the aircraft, was asked just a short time before landing to say a few words to the welcoming crowd that had gathered. His words, which were recounted by his son during the plaque-dedication ceremony at the Mt. Soledad Veterans Memorial, stirred great emotion among those in attendance at the 2008 ceremony just as they did in 1973. Admiral Denton stated, "We are honored to have had the opportunity to serve our country under difficult circumstances. We are profoundly grateful to our Commander-In-Chief and to our Nation for this day. God Bless America."

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

In May 2006, after returning from deployment in Iraq, Captain Martino's and Major Bloomfield's Camp Pendleton squadron sponsored a plaque-dedication ceremony at the Mt. Soledad Veterans' Memorial to commemorate the fallen Marines' heroic service and to provide a place to honor them. Over three hundred Marines stood in line in the hot sun for over three hours to meet the Martino and Bloomfield families and to pay respect for their fallen comrades. The emotions felt by the families and the Marines present at this ceremony are inexplicable. The dedication of those plaques at the foot of the memorial cross overlooking the country that these Marines fought and died to protect provided comfort, solace, and closure for the Marines and the grieving families.

The Martino and Bloomfield families, like so many other families during time of war, have sacrificed much for our country, giving their most precious

¹ Captain Martino was posthumously promoted to Major.

gifts—their sons, brothers, and husbands. The families were most heartened in those somber days after the squadron returned home from Iraq without their loved ones to know that their memories were preserved under the cross at Mt. Soledad. To strip this symbol from the memorial as Plaintiffs’ desire here would uselessly, needlessly, and painfully desecrate these memories.

In the final analysis, whatever “harm” that Plaintiffs will “feel” if the war memorial remains intact pales in comparison to the real and lasting harm that dismantling this memorial will have to the families and to the sacrifices and memories of those heroes—living and dead—who are honored by the memorial. *Amici Curiae* Admiral Denton, Sybil Martino, Robert Martino, and Julie Bloomfield *will* be irreparably harmed should this Court reverse the lower court’s decision.

INTRODUCTION

The purpose of this brief is to provide a voice in this Court that is not often heard. It is the voice of those who will be truly harmed in a *real* way by the destruction of the Mt. Soledad Veterans’ Memorial. Make no mistake about it, dismantling the cross—as Plaintiffs seek in this case—*will* destroy the memorial.

For most *reasonable* American citizens, and particularly those who have sacrificed so much and whose sons, daughters, husbands, and wives have died defending our country, specifically including *Amici Curiae*, the Mt. Soledad

Veterans' Memorial is a lasting tribute to our servicemen and servicewomen. It does not "establish" Christianity as a national religion, as Plaintiffs contend.

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

Like most war memorials, the Mt. Soledad Veterans' Memorial provides a place where family members, friends, and comrades of our war veterans can pay tribute to their heroes' sacrifices. It is fitting that this memorial, which provides much comfort, peace, and solace for those who have sacrificed during time of war, is in the shadow of a cross—a universal symbol of sacrifice. It would desecrate the memories of these war heroes to dismantle this historic memorial by removing the cross, as Plaintiffs request in this case. Accordingly, *Amici Curiae* urge this Court to affirm the district court's well-reasoned decision, which preserves this veteran's memorial for future generations.

STATEMENT OF FACTS

The Mt. Soledad memorial cross remains in the same location it has occupied since 1954.² Today, the memorial cross is just one component of a larger

² A cross has adorned this hilltop in San Diego since 1913.

war memorial that was recently designated a national veterans' memorial by Congress.

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

In a letter dated May 22, 2001, from former President George W. Bush to the Mt. Soledad Memorial Association, the President noted the addition of the granite walls and plaques honoring individual veterans, and stated, "Mount Soledad becomes a place to reflect on our past, be inspired by true American patriots, and offer war veterans our heartfelt gratitude for the freedom we all enjoy today." (App. 22). *Amici Curiae* can attest to the truth of this statement on a very

personal level.³

Consistent with its use as a war memorial, the Mt. Soledad Memorial Association and others conduct regular activities at the memorial site commemorating veterans. In May 2006, several hundred Marines from Camp Pendleton paid tribute to Captain Martino and Major Bloomfield, who were killed in combat in Iraq, by donating plaques of their fallen comrades to the veterans'

³ The declaration of Sybil Martino and accompanying exhibits were filed in the district court as Doc. No. 236 and are included in the appendix to this brief at App. 1 to App. 21. The appendix also includes a picture of the plaque and photographs of the plaque-dedication ceremony for Admiral Denton. (*See* App. 23 to App. 32). *Amici* request that this Court take judicial notice of the Admiral Denton plaque-dedication ceremony, which occurred after the district court rendered its opinion in this case. "The normal rule that [an appellate court] considers only the factual record before the district court, is subject to the right of an appellate court in a proper case to take judicial notice of new developments not considered by the lower court." *In re Matter of American Biomaterials Corp.*, 954 F.2d 919, 922 (3rd Cir. 1992) (internal quotations and citations omitted); *Gustafson v. Cornelius Co.*, 724 F.2d 75, 79 (8th Cir. 1983) ("An appellate court may take judicial notice of a fact for the first time on appeal."); *see also* 16A Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction 3d* § 3956.4 (1999) (noting that a court of appeals may supplement the record to add material not presented to the district court by resort to judicial notice); Fed. R. Evid. 201(f) ("Judicial notice may be taken at any stage of the proceeding."). This ceremony is consistent with and supports the decision of the district court. Moreover, the fact that a plaque-dedication ceremony was held in honor of Admiral Denton is "not subject to reasonable dispute," in that it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *See* Fed. R. Evid. 201(b). Indeed, anyone who visits the Mt. Soledad Veterans' Memorial can view Admiral Denton's plaque, which is now on display.

memorial and holding a service at the memorial site.⁴ Both Martino and Bloomfield were buried with military honors at Arlington National Cemetery.⁵

And more recently, in September 2008, many grateful Americans, including war veterans, a Navy admiral on active duty, and a Navy color guard, among others, attended a plaque-dedication ceremony in honor of the heroic service and sacrifices of Admiral Denton.⁶

In December 2004, the United States Congress passed and the President signed into law Public Law 108-447, which designated the Mt. Soledad Veterans' Memorial a national veterans' memorial. The Chairman of the Armed Services Committee, the author of Section 116, expressly stated that the purpose of this legislation was to create "a national memorial honoring veterans of the United States Armed Forces."

⁴ Photographs of the Martino and Bloomfield plaques as well as photographs of the service at the memorial site are included in the appendix at App. 5 to App. 10. No reasonable observer could conclude that the Mt. Soledad Veterans' Memorial is anything but a war memorial dedicated to honoring the memories and sacrifices of our Nation's fallen veterans.

⁵ Photographs of the funeral of Major Martino held at Arlington National Cemetery are included in the appendix at App. 11 to App. 21. Note the cross on the gravestone of Major Martino, (*see* App. 20), and the crosses on the gravestones of the many other fallen veterans, (*see* App. 12, 13, 14, 17, 19, 20, 21). All of these crosses are displayed on federal property.

⁶ A picture of the Admiral Denton plaque and photographs of the plaque-dedication ceremony are included in the appendix at App. 25 to App. 32.

On August 14, 2006, President Bush signed H.R. 5683, which transferred the ownership of the Mt. Soledad Veterans' Memorial to the federal government for its use and preservation as a national war memorial honoring the veterans of the United States armed services. This bill received overwhelming support in the House and unanimous consent in the Senate.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT TOLERATE DECISIONS THAT DISFAVOR RELIGION.

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the United States Supreme Court stated, without equivocation:

It has never been thought either possible or desirable to enforce a regime of total separation. Nor does the Constitution require complete separation of church and state; *it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.* Anything less would require the callous indifference we have said was never intended by the Establishment Clause. Indeed, we have observed, such hostility would bring us into war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.

Id. at 673 (internal punctuation, quotations, and citations omitted) (emphasis added); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508

U.S. 520, 532 (1993) (“In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a *particular* religion or of religion *in general*.”) (emphasis added).

Plaintiffs disingenuously suggest that they merely desire neutrality. In reality, however, Plaintiffs seek to use the Establishment Clause as a blunt instrument against all things religious or related to religion in any way, including crosses used as part of national war memorials. This court should reject Plaintiffs’ harmful and divisive claims, which seek to bring “us into war with our national traditions.”⁷

⁷ Also troubling is that Plaintiffs have resorted to *ad hominem* attacks against *Amici*’s counsel, the Thomas More Law Center, because the Law Center unapologetically seeks to prevent discrimination against Christians. This is not the first time that an opposing counsel has sought to employ this discredited form of argument in a case in which the Law Center was involved—although it seems particularly hypocritical for the Jewish War Veterans of the United States to do so.

In *Paulson v. Abdelnour*, 145 Cal.App.4th 400, 433 (Cal. Ct. App. 2006), for example, a case in which the Law Center’s Christian identity was similarly used by opposing counsel in his argument and by the trial court in its adverse decision, the appellate court, which reversed the trial court, stated the following:

[W]e are troubled by the proposition that a government entity or any individual appearing as an attorney before a court, on any issue, may first be screened for their sectarian or nonsectarian background or motives before being allowed to appear as an advocate. Whatever the actual propriety of the judicial determination here, such inquiries lead the judicial system into claims of hostility to religion and potential violations of the proviso that no religious test may ever be required of any individual to an office or public trust.

This Court should be no less troubled that Plaintiffs have employed the same unworthy tactic in this case.

Unfortunately, accepting Plaintiffs' distorted view of the law would pave the road for removing all religious imagery or references from official recognition. Banned from public use would be the eye in the Great Seal of the United States (the eye of God in a pyramid representing the Christian Trinity), "In God We Trust" on our coinage, religious stamps the U.S. Postal Service issues at Christmas and Easter, the many white crosses marking the grave sites of our Nation's fallen veterans buried at national cemeteries, the numerous war memorials containing crosses, and even the names of our cities, such as Los Angeles, San Francisco, and Corpus Christi, and all official signs and symbols on which these names appear. The pernicious effect of Plaintiffs' arguments is clear. *See, e.g., School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (concurring opinion) (noting that an "untutored devotion to the concept of neutrality" can lead to "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious").

Contrary to Plaintiffs' claims, throughout its decisions, the Supreme Court has consistently described the Establishment Clause as forbidding decisions that tend to "disapprove," "inhibit," or evince "hostility" toward religion. *See Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) ("disapprove"); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) ("inhibi[t]"); *Lynch*, 465 U.S. at 673 ("hostility"); *see also Rosenberger v. Rector & Visitors of Univ. of*

Virginia, 515 U.S. 819, 846 (1995) (noting that our Constitution prohibits government action that “foster[s] a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires”); *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 532 (stating that the Establishment Clause “forbids an official purpose to disapprove of a particular religion or of religion in general”); *Board of Educ. v. Grumet*, 512 U.S. 687, 717 (1994) (O’Connor, J., concurring) (“The Establishment Clause does not demand hostility to religion, religious ideas, religious people, or religious schools.”). Plaintiffs’ arguments, therefore, are the antithesis of religious tolerance required by our Constitution.

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

[The removal of the religious symbol], based primarily on the religious nature of the tablets’ text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions

of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.

Id. at 704.

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

Indeed, the significance of the *Van Orden* decision has not gone unnoticed by the federal courts, nor should it by this court, as Plaintiffs suggest. (*See* Pls. Br. at 47-55).

For example, in *ACLU v. Mercer County*, 432 F.3d 624 (6th Cir. 2005), a recent Sixth Circuit case upholding the public display of the Ten Commandments in light of the *Van Orden* decision, the court stated, “Our concern is that of the reasonable person. And the ACLU, an organization whose mission is ‘to ensure that . . . the government [is kept] out of the religion business,’ does not embody the reasonable person.” *Id.* at 638 (quoting ACLU website).

The Sixth Circuit stated further:

[T]he ACLU makes repeated reference to “the separation of church and state.” This extra-constitutional construct has grown tiresome.

The First Amendment does not demand a wall of separation between

church and state. Our Nation's history is replete with governmental acknowledgment and in some cases, accommodation of religion.

Id. at 638-39 (citations omitted).

In addition to the Sixth Circuit, other federal courts, including this Court, have decided cases in favor of the public display of religious symbols following *Van Orden*. See, e.g., *Card v. City of Everett*, 520 F.3d 1009 (9th Cir. 2008); *ACLU v. Plattsmouth*, 419 F.3d 772, 778 (7th Cir. 2005) (*en banc*); *ACLU v. Board of Comm'r of Lucas County*, 444 F. Supp. 2d 805, 815 (N.D. Ohio 2006) (making the following, pertinent observation, "Since *Van Orden*, federal courts have uniformly permitted public displays of Ten Commandments monuments"); *Twombly v. City of Fargo*, 388 F. Supp. 2d 983 (D. N.D. 2005); *Russelburg v. Gibson County*, No. 3:03-CV-149, 2005 WL 2175527 (S.D. Ind. Sept. 7, 2005).

Plaintiffs also desire this court to accept their shopworn and demonstrably false claim that the public display of a cross is *per se* unconstitutional and therefore anything the government does short of destroying or removing it is unconstitutional. This argument was recently rejected by the Tenth Circuit in *Weinbaum v. City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008), a case in which the court upheld against an Establishment Clause challenge the display of various Latin crosses on public property. In doing so, the court noted that it would be "folly" to adopt the rule that Plaintiffs propose here. *Id.* at 1022; see also *Capitol*

Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (upholding the public display of a Latin cross); (*see also* photographs of crosses on gravesites at Arlington National Cemetery at App. 12, 13, 17, 19, 20, 21).

As the California appellate court aptly explained in a companion case addressing the Mt. Soledad Veterans' Memorial:

[T]here is no argument presented or any authority cited to us standing for the proposition that the City may transfer the Mount Soledad site only if the cross is removed. We would have serious concerns respecting the prohibition of hostility to religion embedded in article I, section 4 of our Constitution and the federal establishment clause if, prior to otherwise divesting itself of land on which religious artifacts or icons rest, a government entity were required to remove or destroy them.

Paulson, 145 Cal. App. 4th at 420.

While it is true that a cross is a religious symbol, it is also true that it is a symbol that conveys the unmistakable secular message of suffering and ultimate sacrifice. This is particularly true in the context of a veterans' memorial. Thus, it is proper and accurate to describe the Mt. Soledad Veterans' Memorial as a secular veterans' memorial, particularly in light of its history as a war memorial and its physical setting and context.

Finally, Plaintiffs would have this court completely ignore the interests of *Amici Curiae* and the countless other family members, friends, and comrades of our veterans who will be greatly harmed should this court adopt Plaintiffs' erroneous and divisive view of our Constitution. It would be error for this court to do so. Indeed, *Amici Curiae* strongly urge this court to view the attached photograph of Mrs. Martino hugging the casket of her son at the conclusion of the funeral service held on *federal* land by *federal* agents at Arlington National Cemetery. (*See* App. 18). The memory of her son is now preserved at the Mt. Soledad Veterans' Memorial—a memory that Plaintiffs seek to callously destroy in this lawsuit.

In the final analysis, gone are the days of the ACLU's ill-conceived threats to tear down our Nation's history and religious heritage based on a tortured view of the Establishment Clause. This Court should reject this most recent effort by affirming the decision below.

II. THE FIRST AMENDMENT PERMITS ACKNOWLEDGMENT OF RELIGION, BUT FORBIDS HOSTILITY TOWARD ANY.

“We are a religious people whose institutions presuppose a Supreme Being.” *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). From at least 1789, there has been an unbroken history of official acknowledgment by all three branches of government of religion's role in American life. *Van Orden*, 545 U.S. at 685-86 (quoting *Lynch*, 465 U.S. at 674). Examples of this historical acknowledgment

include Executive Orders recognizing religiously grounded National Holidays, such as Christmas and Thanksgiving, Congress directing the President to proclaim a National Day of Prayer each year, the printing on our currency of the national motto, “In God We Trust,” the display of the crèche during Christmas, *see Lynch*, 465 U.S. at 675-77, 686, and representations of the Ten Commandments on government property. *Van Orden*, 545 U.S. at 677; *see also Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding legislative prayer); *McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding Sunday closing laws).

In *Lynch*, the Supreme Court concluded its recitation of examples of government recognition of religion by stating,

One cannot look at even this brief resume [of historical examples] without finding that our history is pervaded by expressions of religious beliefs. . . . Equally pervasive is the evidence of accommodation of all faiths and all forms of religious expression, and hostility toward none. Through this accommodation, as Justice Douglas observed, governmental action has “follow[ed] the best of our traditions” and “respect[ed] the religious nature of our people.” [*Zorach*, 343 U.S. at 314].

465 U.S. at 677-78.

As recently noted by the Supreme Court, “Recognition of the role of God in our Nation’s heritage has also been reflected in our decisions. We have acknowledged, for example, that religion has been closely identified with our history and government, and that the history of man is inseparable from the history of religion.” *Van Orden*, 545 U.S. at 687 (internal quotations and citations omitted); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 26 (2004) (Rehnquist, C.J., concurring in judgment) (“Examples of patriotic invocations of God and official acknowledgments of religion’s role in our Nation’s history abound.”); *id.* at 35-36 (O’Connor, J., concurring in the judgment) (“It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths.”); *Lynch*, 465 U.S. at 675 (“Our history is replete with official references to the value and invocation of Divine guidance.”).

The use of religious symbols has long been a part of government and remains so today. *See, e.g., Van Orden*, 545 U.S. at 688 (“[A]cknowledgments of the role played by the Ten Commandments in our Nation’s heritage are common throughout America.”). Attempts to suppress this recognition and historical acknowledgment—as illustrated by Plaintiffs’ arguments in this case—are the antithesis of the value of religious tolerance that underlies the Establishment Clause. *See, e.g., Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508

U.S. 384, 400 (1993) (Scalia, J., concurring in the judgment) (“What a strange notion, that a Constitution which itself gives ‘religion in general’ preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general.”).

Thus, while the use of religious symbols is a permissible way to acknowledge that we are a religious people with a long and rich religious heritage, decisions that are hostile toward religion—such as the one pressed for by Plaintiffs here—do not enjoy such a favorable history. *See Lynch*, 465 U.S. at 673 (stating that the Constitution “forbids hostility toward any” religion) (internal punctuation, quotations, and citations omitted); *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 532 (acknowledging “that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general”).

Accordingly, in this case a reasonable and informed observer would know that the Mt. Soledad Veterans’ Memorial was built and is maintained by the Mt. Soledad Memorial Association, a private organization. A reasonable observer would see that the cross is but one component of an impressive veterans’ memorial. A reasonable observer would know that while the cross is a religious symbol, it is also a universal symbol of self-sacrifice—and in the context of a war veterans’ memorial, the cross is a symbol of the ultimate sacrifice made for one’s country. The reasonable observer would know that crosses are frequently used to

memorialize fallen warriors, and not only on individual graves. For example, large memorial crosses are displayed on federal property at Arlington National Cemetery (the Argonne Memorial and Canadian Cross of Sacrifice) and Gettysburg National Military Park (Irish Brigade Monument), and municipal property at the Taos Plaza (a cross memorializing soldiers of the Bataan Death March of World War II).

A reasonable observer would know that, historically, the cross has been used as a generic grave marker for fallen soldiers, even when the religious beliefs of the individual honored by the cross were unknown. For example, it is commonly known that there are thousands of crosses marking the gravesites of fallen United States soldiers at places such as Flanders Field in the Netherlands (World War I) and Normandy, France (World War II). The striking image of a sea of white crosses conveys the powerful, secular message of ultimate sacrifice, not simply Christianity. Likewise here, the observer would know that many family members, friends, and comrades of our veterans have chosen to honor their heroes and remember their sacrifices by placing individual plaques in the shadow of the historic Mt. Soledad cross, as is the case with *Amici Curiae* Admiral Denton, Sybil and Robert Martino, and Julie Bloomfield.

Plainly, what was true in 1954 remains even truer today—the Mt. Soledad Veterans' Memorial, including the memorial cross, is a world-class veterans' memorial dedicated to honoring our Nation's veterans; it provides a place of

comfort and solace to the many family members, friends, and comrades of our veterans and fallen heroes. Thus, a reasonable observer would conclude that this memorial is not about religion; it is about remembering our veterans who have sacrificed for this country. It is about a national veterans' memorial that stands as a symbol of patriotism.

In the final analysis, the memorial cross, in its present physical setting, does not convey an impermissible message of endorsement of religion to an informed, reasonable observer. Rather, this memorial conveys an unmistakably American message of patriotism and self-sacrifice. To dismantle this historic memorial would desecrate the memories and the sacrifices of our war veterans and cause incalculable harm to these veterans and their families, friends, and comrades. Included in the list of those who will be *irreparably harmed* by removing the cross are *Amici Curiae*. Thus, this court should reject Plaintiffs' misguided efforts to destroy a national landmark and treasure based on their flawed view of the Constitution. Accepting Plaintiffs' view will cause real and palpable harm.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision.

STATEMENT OF RELATED CASES

Amici curiae are not aware of any related cases pending in this Court. The related cases at issue here have been consolidated by this Court.

Respectfully submitted,
THOMAS MORE LAW CENTER

By: /s/ Robert J. Muise
Robert J. Muise, Esq.

Charles S. LiMandri, Esq.
LAW OFFICES OF CHARLES S. LiMANDRI
WEST COAST REGIONAL OFFICE OF THE
THOMAS MORE LAW CENTER

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 29, Fed. R. App. P. 32(a)(7), and Circuit Rule 32-1, the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 4,932 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: February 23, 2009.

/s/ Robert J. Muise
Robert J. Muise, Esq.
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in this case are not registered CM/ECF users. I have mailed the foregoing brief by First Class Mail, postage prepaid, to the following non-CM/ECF participants:

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Deputy City Attorney
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San Diego, CA 92101

Charles V. Berwanger
Gordon and Rees
101 West Broadway, Suite 1600
San Diego, CA 92101

/s/ Robert J. Muise
Robert J. Muise, Esq.
Attorney for Amici Curiae

APPENDIX

Consent Brief of *Amici Curiae* Rear Admiral Jeremiah Denton, USN (Ret.), Sybil Martino, Robert Martino, and Julie Bloomfield in Support of Appellees and Affirmance

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7 Ann Arbor, Michigan 48106
Tel: (734) 827-2001; Fax: (734) 930-7160
8 * Not admitted in this jurisdiction

9 *Counsel for Amici Curiae Sybil Martino and Robert Martino, individually and on behalf of*
their deceased son Maj. Michael D. Martino, USMC; Julie Bloomfield, individually and on
10 *behalf of her deceased husband Maj. Gerald M. Bloomfield, II, USMC*

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

12 STEVEN TRUNK and PHILIP K.
PAULSON,

13 Plaintiffs,

14 v.

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

16 Defendants,

17 MOUNT SOLEDAD MEMORIAL
ASSOCIATION,

18 Real parties in interest.

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

22 Plaintiffs,

23 v.

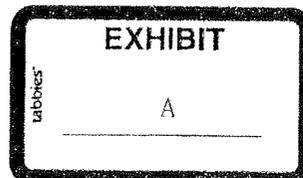
24 ROBERT M. GATES, Secretary of Defense,
in his official capacity,

25 Defendant.

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

DECLARATION OF *AMICUS*
***CURIAE* SYBIL MARTINO,**
individually and on behalf of her
deceased son MAJ. MICHAEL D.
MARTINO, USMC

Hon. Larry Alan Burns



1 I, SYBIL MARTINO, make this declaration pursuant to 28 U.S.C. § 1746.

2 1. I am a citizen of the United States and the mother of Michael D. Martino, who
3 was killed on November 2, 2005, while flying his AH-1 W Super Cobra attack helicopter in
4 support of security operations in Iraq.¹ The Marine helicopter was shot down by a surface-to-
5 air missile.

6 2. At the time of his death, Michael was a Captain on active duty in the U.S.
7 Marine Corps. He was posthumously promoted to Major.

8 3. Michael's co-pilot was Major Gerald M. Bloomfield, II, USMC. Jerry was
9 killed in the attack as well. Michael and Jerry were a designated combat team by their unit.
10 They were both awarded Air Medals with Combat "V" for a mission they performed prior to
11 being killed in November 2005.

12 4. During an earlier deployment to Iraq in 2004, Michael served as a forward air
13 controller for a Marine infantry unit—2d Battalion, 1st Marines of the 1st Marine Division.
14 During the Battle for Fallujah in April 2004, Michael called in air strikes with a forward sniper
15 team and was awarded a Bronze Star with Combat "V" for his heroic actions.

16 5. In May 2006, after returning from deployment in Iraq, Michael's Camp
17 Pendleton squadron sponsored a plaque dedication ceremony at the Mt. Soledad Veterans'
18 Memorial to commemorate Michael's and Jerry's heroic service and to provide a place to honor
19 them. Over three hundred Marines stood in line in the hot sun for over three hours to meet us
20 and Jerry's family, including Jerry's wife, Julie Bloomfield, and to pay their respect for their
21 fellow Marines who were killed in action. The emotions we felt that day were inexplicable.
22 The dedication of those plaques at the foot of the memorial cross overlooking the country that
23
24

25 ¹ A true and accurate photograph of Michael is attached to this declaration as Exhibit 1.

1 Michael and Jerry fought and died to protect provided comfort, solace, and closure for me and
2 the rest of Michael's surviving family members. The Bloomfield's had a similar experience.

3 6. True and accurate photographs of Michael's and Jerry's plaques and the
4 dedication ceremony at the Mt. Soledad Veterans' Memorial are attached to this declaration as
5 Exhibits 2 through 6.

6 7. We were most heartened in those somber days after Michael's Marine squadron
7 returned home from Iraq without him to know that his memory was preserved under the cross at
8 Mt. Soledad. To strip this symbol from the memorial would uselessly, needlessly, and, I would
9 add, painfully desecrate Michael's memory and the memory of all of those other heroes
10 honored at this memorial. Make no mistake about it, removing the cross will destroy this
11 veterans' memorial.

12 8. Like so many other families during time of war, we have sacrificed much for this
13 country. As a mother, I gave my most precious gift—my son. I will never get him back, but I
14 will always cherish my memories of him, including the memory of him preserved at the Mt.
15 Soledad Veterans' Memorial.

16 9. Michael and Jerry were buried with military honors at Arlington National
17 Cemetery. True and accurate photographs of Michael's funeral are attached to this declaration
18 as Exhibits 7 through 17. Saying goodbye to him was the hardest thing I have ever done. The
19 picture attached to this declaration as Exhibit 14 can barely begin to capture the sadness in my
20 and my husband's hearts over the loss of our son Michael.

21 10. I see the Mt. Soledad Veterans' Memorial standing as a tribute to Michael and
22 all the other veterans who have sacrificed dearly for our great country. The memorial
23 represents the sacrifices these veterans and their families have made and the gratitude we, as a
24 community and a nation, have for them.

25

1 11. As parents of one of the fallen veterans honored at the Mt. Soledad
2 Veterans' Memorial, my husband and I plead with this court to keep the memorial intact.

3 To tear down the cross from this memorial would desecrate the memory of Michael and all of
4 the other veterans honored by this memorial, causing great pain and anguish for the families of
5 these men and women.

6 I declare under penalty of perjury under the laws of the United States that the foregoing
7 is true and correct.

8 Executed this 3 day of October, 2007 in the United States of America.

9
10 
11 SYBIL MARTINO



EXHIBIT

App. - 5

1

MICHAEL D. "MARTINI" MARTINO

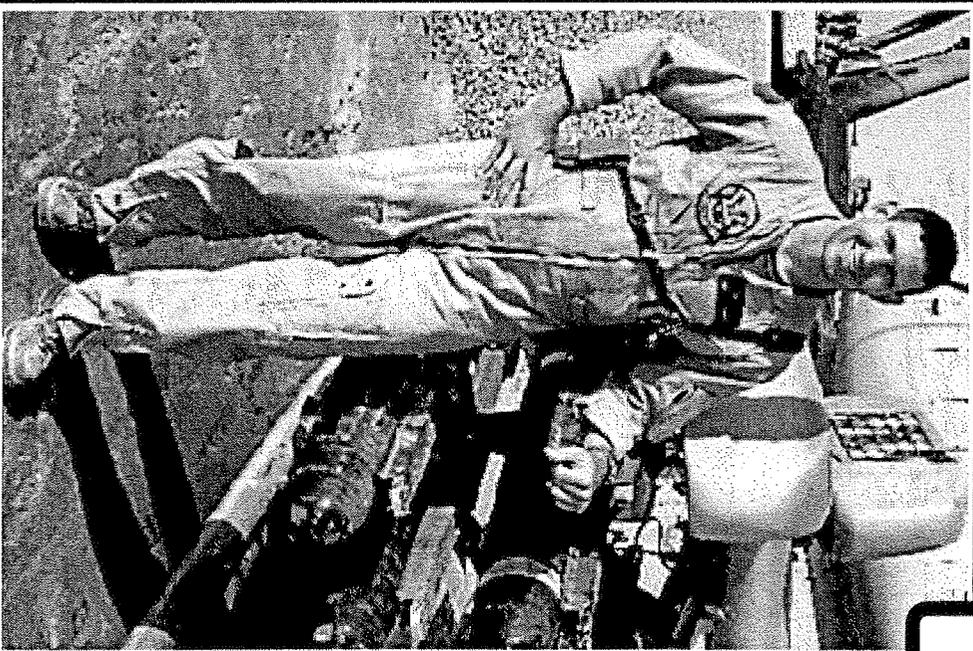
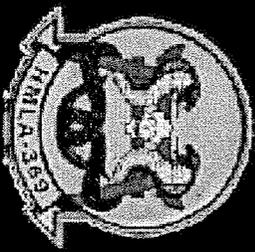
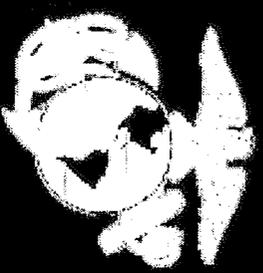
Captain
U. S. Marine Corps
Southwest Asia
Operation Iraqi Freedom
Killed in Action 2 Nov 2005



Naval Aviator

MEDALS-RIBBONS: Purple Heart, Air Medal - Individual
w/Combat "V" and 1 Strike/Flight Award, Commendation
w/Combat "V", Combat Action, Unit Commendation w/1 Star,
Meritorious Unit Commendation, National Defense Service w/1
Star, Iraq Campaign, Global War on Terrorism Expeditionary and
Service, Sea Service Deployment w/1 Star

On his second Iraq tour, "Martini" made the ultimate sacrifice in support
of security and stabilization operations flying "Gunshot 66" in the
Al Anbar Province.
Posthumously promoted
to Major.



Semper Paratus
With pride and love, you are missed

EXHIBIT



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EXHIBIT
4

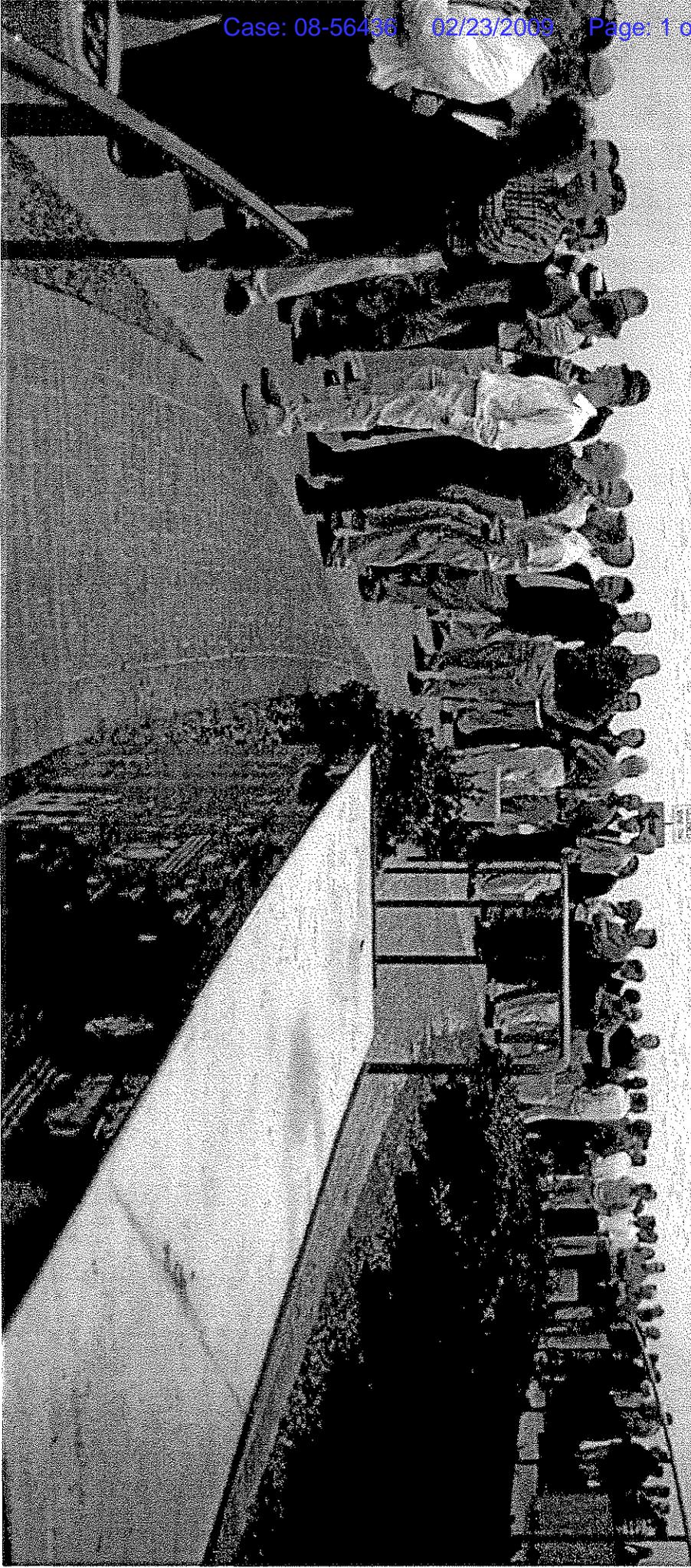


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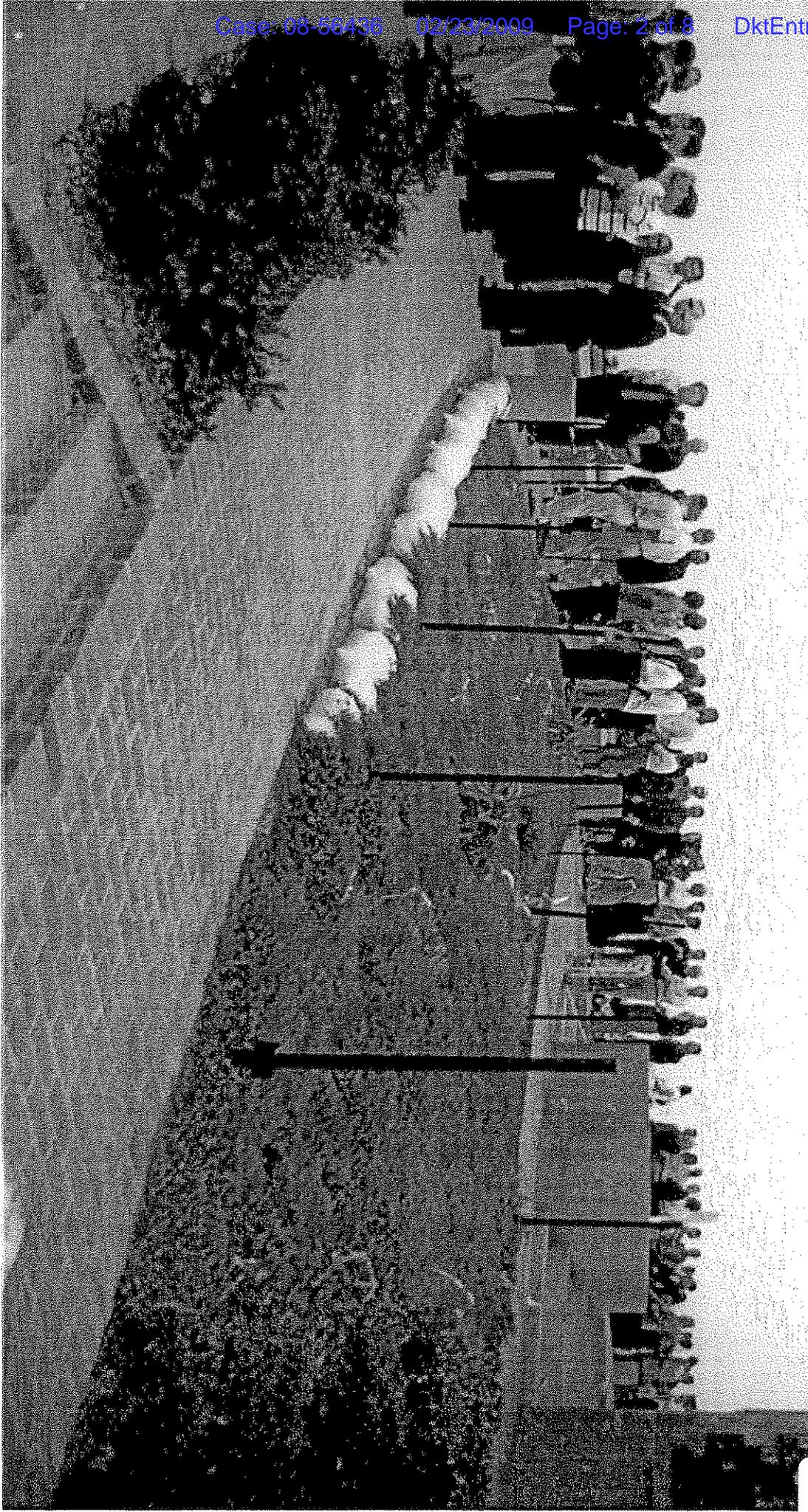


EXHIBIT
6

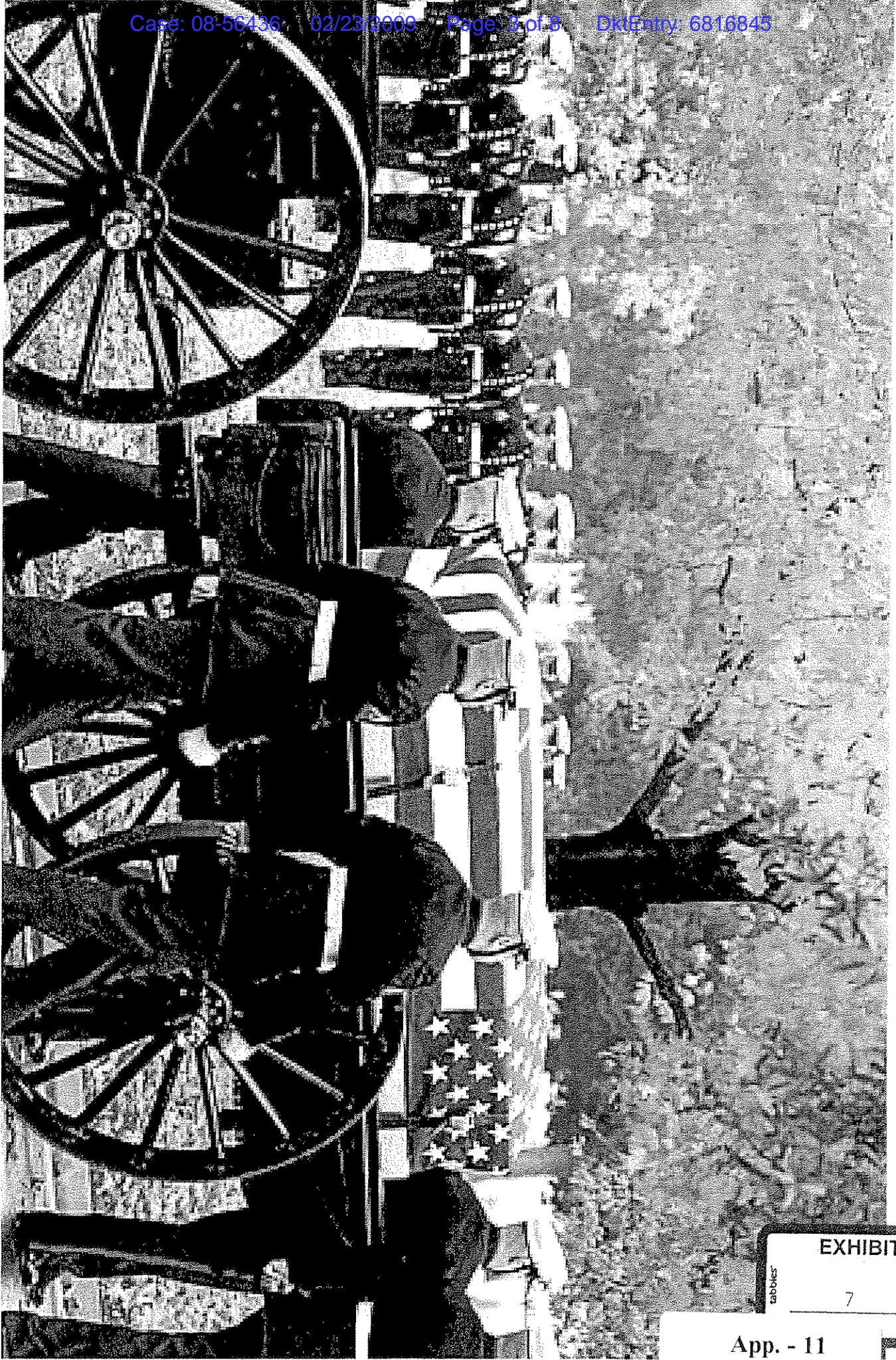


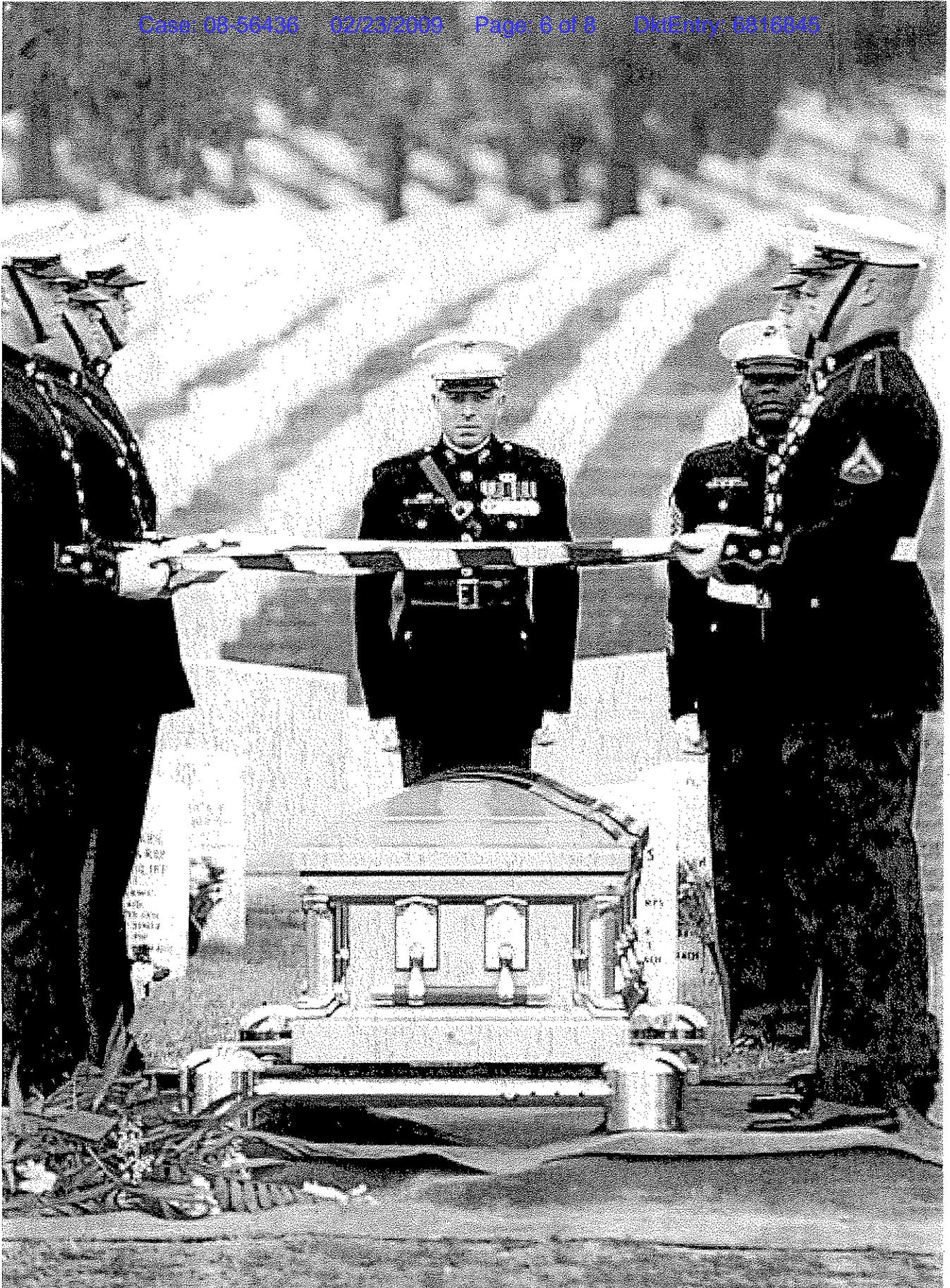
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EXHIBIT
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EXHIBIT
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9
App. - 13



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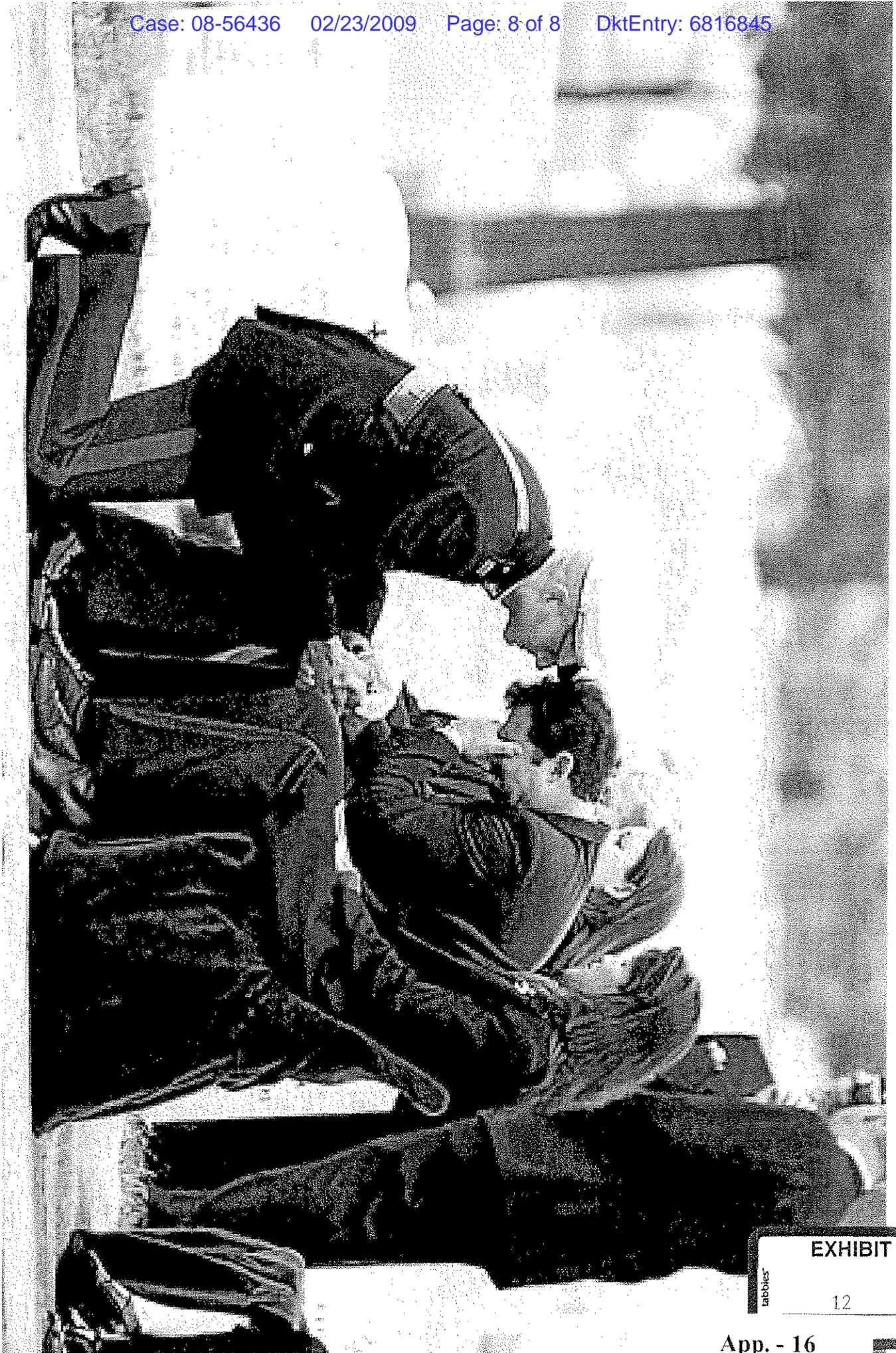
EXHIBIT

10



EXHIBIT

11



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EXHIBIT
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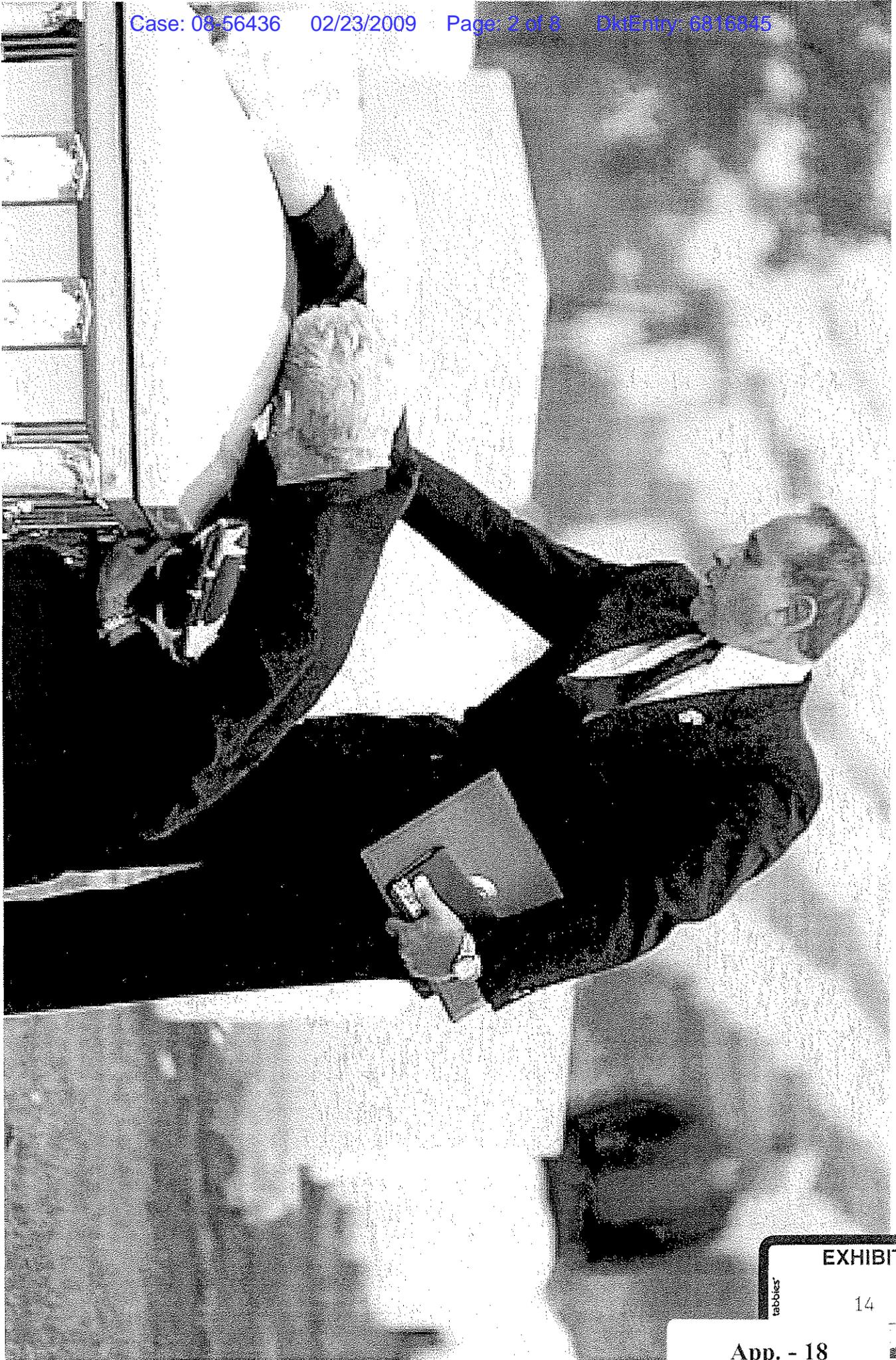
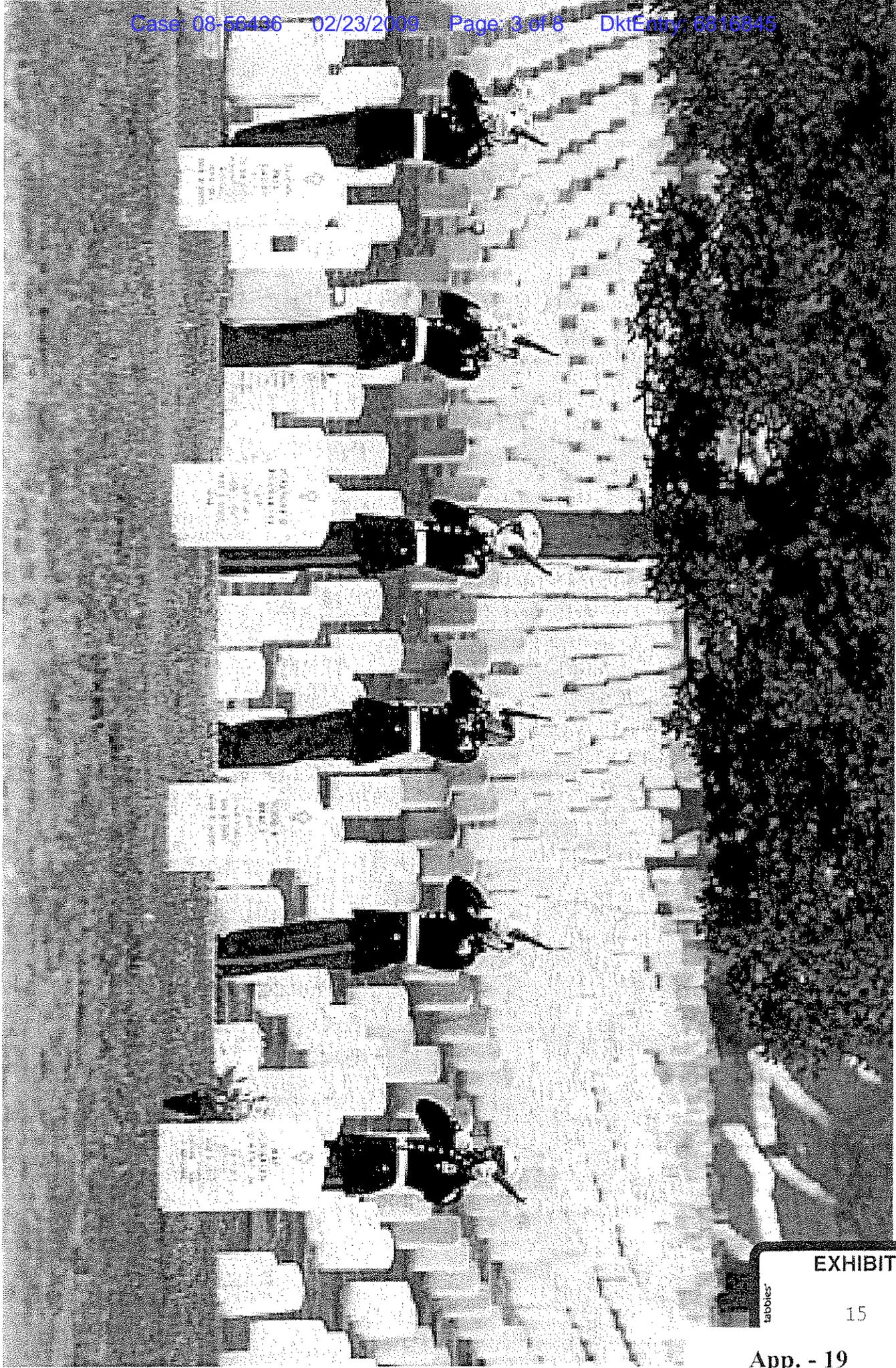
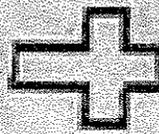


EXHIBIT
14





MICHAEL DAVID
MARTINO

MAJ

US MARINE CORPS

JAN 31 1973

NOV 2 2006

PURPLE HEART

AM W/V

NMCCM W/V

OPERATION

IRAQI FREEDOM

06/14/2006

EXHIBIT

16

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06/14/2006



AMITY SCOTT
 OSWINE
 BORN 1911
 DIED 1981
 BURIED 1981
 OSWINE

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EXHIBIT

17



THE WHITE HOUSE

WASHINGTON

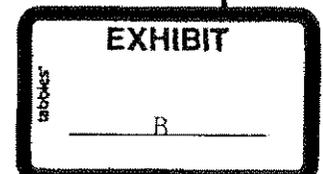
May 22, 2001

I am pleased to send warm greetings to the Mount Soledad Memorial Association as you dedicate the first two of your planned Veterans Memorial Walls. This Memorial Day ceremony provides a fitting opportunity for area residents to join in paying tribute to those who are honored by the Mount Soledad War Memorial.

The United States owes a tremendous debt of gratitude to all those who have served our country in peace or at war. Their sacrifices for our freedom, as well as for others around the world, have not been forgotten. This year, we especially remember the 60th anniversary of the bombing of Pearl Harbor, which ushered our Nation into World War II, and the 10th anniversary of the end of the Persian Gulf War.

I salute memorial supporters for developing this worthwhile project, which will eventually list more than 3,000 tributes upon its six walls. With the dedication of these walls, Mount Soledad becomes a place to reflect on our past, be inspired by true American patriots, and offer war veterans our heartfelt gratitude for the freedom we all enjoy today.

Laura joins me in sending best wishes on this special occasion.



Nos. 08-56415 & 08-56436

UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

JEWISH WAR VETERANS; STEVE TRUNK; et al.,
Plaintiffs/Appellants

vs.

CITY OF SAN DIEGO; et al.,
Defendants/Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
HON. LARRY ALAN BURNS
CIVIL NOS. 3-06-cv-01597-LAB; 3:06-cv-01728-LAB

DECLARATION OF BRIAN J. ROONEY

ROBERT J. MUISE, ESQ.
Thomas More Law Center
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, Michigan 48106
(734) 827-2001

Attorneys for Amici Curiae

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Thomas More Law Center
Box 9120
Rancho Santa Fe, California 92067
(858) 759-9930

-
1. I, Brian J. Rooney, make this declaration pursuant to 28 U.S.C. § 1746 and

based on my personal knowledge.

2. I am an adult citizen of the State of Michigan and have personal knowledge of the facts testified to in this sworn declaration.

3. On September 19, 2008, I attended the special plaque dedication ceremony for Rear Admiral Jeremiah A. Denton, Jr., USN (Retired) at the Mt. Soledad Veterans' Memorial in San Diego, California. This plaque dedication ceremony also commemorated the 2008 National POW/MIA Recognition Day.

4. Attached to this declaration as Exhibit A is a true and accurate picture of the plaque that was dedicated in honor of Admiral Denton's service and sacrifice for our Nation. This plaque is on display at the Mt. Soledad Veterans' Memorial.

5. Attached to this declaration as Exhibits B through H are true and accurate photographs of the Admiral Denton plaque dedication ceremony held on September 19, 2008 at the Mt. Soledad Veteran's Memorial.

I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

Executed on this 10th day of February 2009.



Brian J. Rooney



U. S. Naval Academy



Class of 1947

JEREMIAH ANDREW DENTON JR.

Rear Admiral

U. S. Navy

World War II - Korea - Vietnam

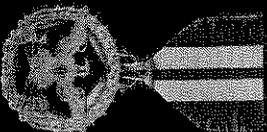
Prisoner of War 18 JUL 1965 - 13 FEB 1973



Navy Cross



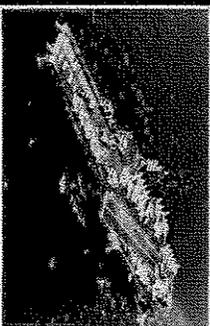
Naval Aviator



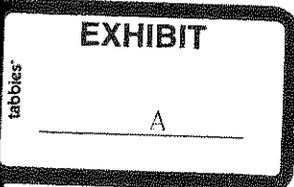
Defense Distinguished Service

MEDALS-RIBBONS: Navy Distinguished Service, Silver Star w/2 Stars, Distinguished Flying Cross, Bronze Star w/4 Stars, Purple Heart w/1 Star, Air Medal w/1 Star, Combat Action, ... Cold War veteran, multiple attack alpha strike leader, exemplified extraordinary and sustained valor leading prisoner resistance against exploitation by Communist captors.

Warrior, Statesman, Humanitarian



USS Independence CV-62



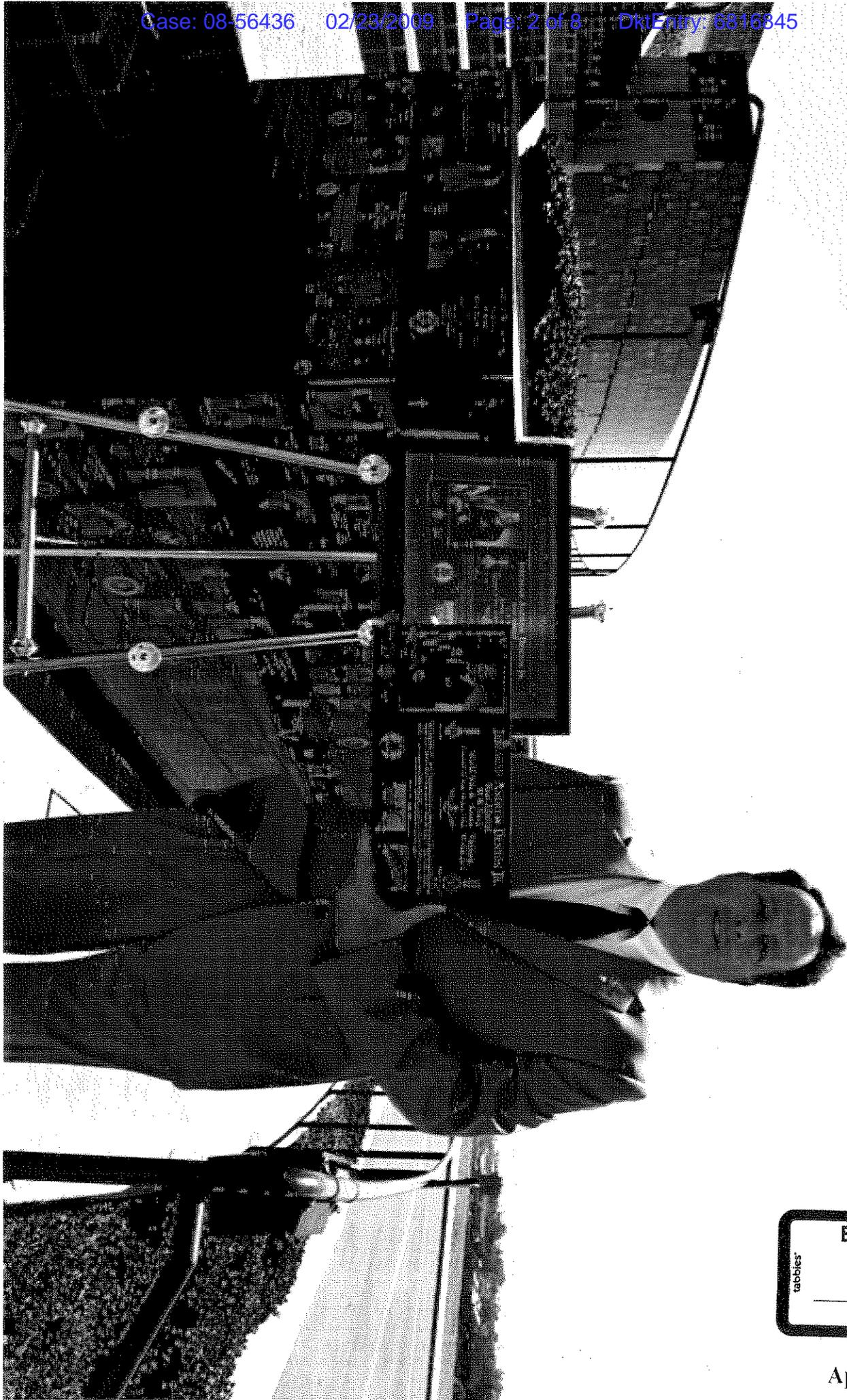


EXHIBIT
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EXHIBIT
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App. - 27



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