No. _____

In the Supreme Court of the United States

UTAH HIGHWAY PATROL ASSOCIATION,
Petitioner,

v.

AMERICAN ATHEISTS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A private, nonreligious organization commemorated Utah highway troopers killed in the line of duty by placing, with the State's permission, roadside memorial crosses near the location where each trooper was mortally injured. Each memorial prominently displayed the fallen trooper's name, highway-patrol designation, rank, badge number, year of death, and a biographical plaque. An atheist group and its members sued the State, claiming that the government's accommodation of this private speech violated the Establishment Clause of the United States Constitution and demanding the removal of these memorials. The United States Court of Appeals for the Tenth Circuit agreed, holding that the memorials could not remain and denying rehearing en banc by a 5-4 vote.

The following questions warrant review because the Tenth Circuit's decision perpetuates a circuit split and conflicts with this Court's precedent:

1. Did the Tenth Circuit err in selecting which Establishment Clause test to apply when analyzing passive public displays, an issue that has divided the circuit courts three ways after *Van Orden v. Perry*?

2. Did the Tenth Circuit err in holding that the Establishment Clause forbids roadside memorial crosses marking the site of death for state highway troopers killed in the line of duty?

3. Did the Tenth Circuit err in classifying as government speech a collection of memorials owned by a private organization, disclaimed by the State, and located on both private and public property?

PARTIES TO THE PROCEEDING

Petitioner is the Utah Highway Patrol Association. This private Association, which created, funded, owns, and maintains the challenged memorials, was a defendant-intervenor in the district court and an appellee in the circuit court.

Additional defendants in the district court and appellees in the circuit court include the following state officials: Colonel Lance Davenport (who replaced Colonel Scott T. Duncan), Superintendent of the Utah Highway Patrol; John Njord, Executive Director of the Utah Department of Transportation; and F. Keith Stepan, Director of the Division of Facilities Construction & Management in the Department of Administrative Services.

Respondents are American Atheists, Inc., a Texas, nonprofit corporation; R. Andrews; S. Clark; and M. Rivers. They were plaintiffs in the district court and appellants in the circuit court.

CORPORATE DISCLOSURE STATEMENT

Petitioner Utah Highway Patrol Association is a private, nonreligious, fraternal nonprofit Utah corporation, exempt from taxation under I.R.S. § 501(c)(8), with a mission to support highway-patrol officers and their families. It does not have parent companies and is not publicly held.

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The opinion of the United States District Court for the District of Utah is reported at 528 F. Supp. 2d 1245 and reprinted at App. 41a-76a. The original panel opinion of the United States Court of Appeals for the Tenth Circuit is reported at 616 F.3d 1145. The Tenth Circuit's amended panel opinion is reported at 2010 WL 5151630 (publication in F.3d forthcoming) and reprinted at App. 1a-40a. The Tenth Circuit's order granting in part the state officials' petition for panel rehearing and denying the parties' petitions for rehearing en banc (including two opinions, joined by four judges, dissenting from that denial) is reported at 2010 WL 5151630 (publication in F.3d forthcoming) and reprinted at App. 77a-102a.

STATEMENT OF JURISDICTION

On August 18, 2010, the Tenth Circuit issued its original panel decision and entered judgment. Petitioner then sought rehearing en banc, and the state officials requested rehearing with suggestion for rehearing en banc. On December 20, 2010, the Tenth Circuit granted in part the state officials' petition for rehearing, amended the panel decision by changing one word, and denied the petitions for rehearing en banc over four dissenting votes. On March 8, 2011, this Court extended the time to petition for a writ of certiorari until April 20, 2011. This Court has jurisdiction to review this case under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

This case raises the question whether the Establishment Clause of the United States Constitution demands that a private, nonreligious organization of public-safety officers remove from public and private land roadside memorial crosses honoring fallen colleagues.

A. Factual Background

The Utah Highway Patrol Association (the "Association") is a private, nonreligious, fraternal nonprofit corporation with a mission to support Utah Highway Patrol ("UHP") officers and their families. App. 42a ¶¶ 1-2. In 1998, the tragic ambush and killing of a young officer prompted the Association to begin commemorating fallen troopers, by placing the first of 13 white roadside memorial crosses on public and private property at or near locations where troopers have been mortally injured. App. 42a-44a ¶¶ 4-5, 12; App. 6a-7a.

The memorials are privately originated, financed, administered, and maintained. The Association selected and designed the memorials without government input, App. 45a ¶ 18; erected the memorials without government funding, App. 45a ¶ 17; App. 9a; retains ownership of the memorials, App. 9a; and maintains the memorials without government resources, App. 45a ¶ 17; App. 9a.

The Association erected the memorials to further three purposes: to memorialize troopers who died in the line of duty; to remind the public of those troopers' service and ultimate sacrifice; and to prompt motorists to drive safely and thus abate further highway casualties. App. 45a ¶ 19; App. 7a. To achieve these goals, the Association wanted a memorial symbol that would simultaneously convey to passing motorists that a trooper died while serving near this spot, that the trooper will always be honored and remembered, that the people of Utah are indebted and grateful, and that safety is a paramount concern on the roads. App. 59a.

The Association chose to use a Latin cross—a figure with a shorter horizontal bar intersecting a longer vertical bar above its midpoint—because in this context the cross, unlike any other marker, communicates to motorists passing at highway speeds the "simultaneous messages of death, honor, remembrance, gratitude, sacrifice, and safety." App. 45a-46a ¶¶ 20, 26; App. 7a-8a. Roadside crosses are widely used to memorialize, and generally understood to represent, traffic-related and other

roadside deaths. App. 34a; App. 110a; *infra* n.11. And by evoking thoughts of highway fatalities, those crosses remind motorists of roadway dangers and urge driver caution. App. 46a ¶ 26. It is undisputed that the Association chose the cross symbol for these reasons; it did not intend to convey a message of religious support or endorsement. App. 46a ¶ 25.

The Association designed the remaining features of the memorials so that they would "conspicuously and immediately convey the death of a Utah Trooper to observers that drive by [them]." App. 46a ¶ 23. Each memorial thus prominently identifies the deceased as a Utah trooper, by displaying the fallen trooper's name, trooper designation, rank, and badge number on the crossbar, and the UHP logo directly beneath that. App. 44a ¶ 15; App. 6a. The Association wants passing motorists to see this biographical information, so the UHP logo is 12 inches tall by 16 inches wide, App 46a ¶ 24; App. 6a; and the personal information—which spans the entire six-foot crossbar of a 12-foot-tall cross, App. 6a—is written in approximately 8-inch-tall, black, capitalized lettering, "the same size text used for posting the words 'SPEED LIMIT' alongside major interstate highways," App. 98a. Directly beneath the UHP logo, similar large, black lettering indicates the year that the trooper died. App. 44a ¶ 15; App. 6a. Below the year of death, a plaque displays a picture of the deceased trooper and recounts his public service and tragic death. App. 44a ¶ 14; App. 6a-7a.[1]

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[1] Pictures of the memorials are in the appendix at App. 39a-40a, 98a.

Each memorial "cross, near the highway, with the inscriptions, symbols and plaques mentioned above, conveys the unmistakable message that a Utah Highway Patrolman died near this spot while serving the people of Utah." App. 8a. Plaintiffs indeed admitted that the Association's memorials communicate this commemorative message to them. App. 114a-116a; App. 118a-119a; App. 121a.

Surviving family members approved each memorial, App. 43a ¶ 7; App. 8a; and they have never objected to the use of the roadside cross memorial or requested that the Association commemorate their loved one using a different symbol, App. 8a.

The Association placed the memorials near the site where each trooper had been mortally injured, in a spot visible to passing motorists, and at a location safe for the public to stop and view. App. 44a, 47a ¶¶ 12, 13, 35; App. 8a. Initially, the Association placed three memorials on private property, but those were too far from the roadways and thus not easily seen by passing motorists. App. 9a. The Association then sought and received permission from the Utah Department of Transportation ("UDOT") to erect memorials on public property closer to the roadways. App. 9a. UDOT, in turn, established a procedure for the Association to obtain the State's consent for future memorials. App. 43a-44a ¶ 10.

While the State allowed the Association to erect its memorials on public land, UDOT expressly

declined to endorse those memorials, noting that it "neither approves [n]or disapproves the memorial marker[s]." App. 9a; App. 128a. UDOT also disclaimed ownership of the memorials, denied any legal liability that might result from them, and renounced responsibility to defend their content (particularly, their Latin-cross shape) or placement on public land. App. 128a-129a.

Soon after this lawsuit began, the Utah Legislature issued a resolution supporting the Association's memorials. App. 107a-112a. That resolution acknowledged that "a white cross has become widely accepted as a symbol of a death, and not a religious symbol, when placed along a highway" and that the memorials' cross shape "was never intended as a religious symbol, but as a symbol of the sacrifice made by these highway patrol officers." App. 110a-111a. The Legislature approved a nearly identical resolution in March 2011. *See* H.C.R. 16, 2011 Leg., Gen. Sess. (Utah 2011).

In Utah, Christians who revere the cross as a symbol of their religion constitute only 18% of the population. App. 37a. The remainder of the State's population is divided primarily between the 57% of citizens who belong to The Church of Jesus Christ of Latter-Day Saints, a denomination that does not use the cross as a symbol of its faith, App. 47a ¶¶ 32-33; App. 23a; and the 20% of citizens who profess no religious affiliation or adhere to other religious faiths that do not venerate the cross as a religious symbol, App. 67a n.7.

B. Procedural Background

On December 1, 2005, Plaintiffs filed this suit against various state officials in their individual and official capacities under 42 U.S.C. § 1983. App. 49a. Plaintiffs' original complaint alleged two causes of action: first, that the State violated the Establishment Clause of the First Amendment to the United States Constitution (and the comparable provision of the Utah Constitution) by allowing a private organization—the Association—to erect roadside memorial crosses on public property and by not objecting to the Association's inclusion of the UHP logo on those memorials; and second, that the State favored the Association's expression and thus violated the Free Expression Clause of the First Amendment by allowing the Association to post its memorials on public property. App. 49a. After learning that three of the challenged memorials are located on private property, Plaintiffs nevertheless insisted that those memorials also violate the Establishment Clause because they display the UHP logo.

Soon after Plaintiffs commenced this action, the Association moved to intervene to defend its memorials. App. 49a. The district court granted that request, allowing the Association to intervene as of right. App. 49a. Plaintiffs then withdrew their Free Expression claim. App. 49a n.1.

All parties filed cross-motions for summary judgment. App. 49a-50a. On November 20, 2007, the district court issued its decision, finding that the Association's memorials did not violate the

Establishment Clause or the Utah Constitution. App. 74a.

The district court applied the endorsement version of the three-part test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). App. 51a-54a. The court first held that "the undisputed material facts" show a "secular purpose"—"that of honoring UHP troopers who died during their term of service." App. 58a-59a. The court next considered the effect prong, concluding that a reasonable observer "would not view the memorial crosses as a government endorsement of religion" because "Americans have used [the cross symbol] to honor the place[s] where . . . citizens," "regardless of their religious belief," have "had fatal accidents." App. 66a-67a. And finally, given the absence of any religious purpose or entity in this case, the court easily rejected any suggestion of "excessive entanglement [between] church and state." App. 73a-74a.

The district court acknowledged the Association's argument that the memorials are not government speech, but its own private speech. App. 75a-76a n.10. Yet the court determined that it need not address that issue because it had already held that the State's "limited participation in [the Association's] program" did not violate the Establishment Clause. App. 75a-76a n.10.

Plaintiffs timely appealed to the Tenth Circuit, which reversed the district court's decision and ordered judgment in Plaintiffs' favor. App. 38a. The Tenth Circuit began by relying on *Pleasant Grove*

City v. Summum, 129 S. Ct. 1125 (2009), to characterize the Association's memorials—those on public land as well as those on private land—as official government speech rather than the Association's private speech. App. 14a-18a.[2]

The Tenth Circuit then addressed the question of which Establishment Clause test to apply. App. 19a-20a. After noting its opinion that *Van Orden v. Perry*, 545 U.S. 677 (2005), has generated "confusion" on that issue, App. 20a, the court determined that it must apply the *Lemon*/Endorsement test,[3] App. 19a-20a. The Tenth Circuit then agreed with the district court that the purpose for "erecting these memorials is only secular: to honor fallen troopers and to promote safety on the State's highways." App. 23a. The circuit court nevertheless "conclude[d] that the cross memorials would convey to a reasonable observer that the state of Utah is endorsing Christianity" because (1) the memorials "stand[] alone" on "public land" in the shape of a cross, (2) the cross is "the preeminent symbol of Christianity," and (3) the memorials include the UHP logo. App. 29a. That court thus found an Establishment Clause violation.

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[2] When characterizing the memorials as government speech, the Tenth Circuit considered all the memorials collectively; it did not distinguish the displays on public land from those on private property, *see* App. 14a-18a; and thus its holding on this issue necessarily applies to the memorials on private land.

[3] The Tenth Circuit used—and we, too, have adopted—the phrase "*Lemon*/Endorsement test" to describe the *Lemon* test as modified by the endorsement concept discussed in this Court's subsequent jurisprudence.

The Association filed a petition for rehearing en banc, and the State filed a petition for rehearing with suggestion for rehearing en banc. App. 79a. On December 20, 2010, the court denied those petitions, except it granted in part the State's request for panel rehearing and amended one word in its original decision. App. 79a.[4] Four of the nine judges eligible to vote on rehearing the case en banc—Judges Kelly, O'Brien, Tymkovich, and Gorsuch—forcefully dissented from the denial of rehearing en banc. App. 80a.

Judge Kelly's dissent, joined by all the dissenting judges, highlighted several flaws with the panel's decision. To begin, the panel's opinion conflicted with this Court's precedent by focusing excessively on the cross shape of the Association's memorials and "effectively presuming that religious symbols on public property are unconstitutional." App. 81a, 84a-86a. Moreover, the panel's "reasonable observer" reached grossly "unreasonable" conclusions because, contrary to this Court's precedent, he failed to consider the memorials' physical characteristics, context, and history. App. 86a-92a. And the panel's decision conflicted with

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[4] The original decision stated that "there is no evidence in the record that the cross has been *universally* embraced as a marker for the burial sites of non-Christians or as a memorial for a non-Christian's death." *See* App. 32a (emphasis added); App. 79a. The court's amended decision substituted the word "widely" for "universally," *see* App. 79a, but did not acknowledge that ample evidence in the factual record (and information presented by amici) shows that crosses have been widely used as burial markers and memorials, *see, e.g.*, App. 45a-46a ¶¶ 21-22; App. 65a-67a; App. 123a-126a; *infra* n.12.

this Court's precedent by "requir[ing] the government to strip religious symbols of all religious significance as a condition precedent for display on public property." App. 92a-93a. This error was particularly "remarkable" because just last year a plurality of this Court in *Salazar v. Buono*, 130 S. Ct. 1803 (2010), wrote that "*[a] cross by the side of a public highway marking . . . the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs*." App. 94a (quoting *Buono*, 130 S. Ct. at 1818) (emphasis added).

Judge Gorsuch authored a second dissent, which was joined by Judge Kelly. Citing decisions from this Court and a circuit split, Judge Gorsuch noted that it "is far from clear" whether the "reasonable observer/endorsement test remains appropriate for assessing Establishment Clause challenges" to passive public displays. App. 100a. That test, Judge Gorsuch noted, "rests on [the] uncertain premise" that courts may "invalidate not only . . . laws and policies that *actually* respect the establishment of religion, but also laws and policies [that] a reasonable hypothetical observer could *think* do so." App. 101a (quotation marks, alteration, and citation omitted). But even assuming that the endorsement test was the appropriate inquiry, Judge Gorsuch emphasized that the panel's observer—a hopelessly "[b]iased, selective, [and] vision impaired" chap—conflicted with the well-informed "reasonable observer of Justice O'Connor's description." App. 98a-99a.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit held that the Establishment Clause forbids a private organization from commemorating the location of a trooper's death with a roadside memorial cross prominently identifying the deceased as an officer killed in the line of duty. This Court should grant the writ and reverse.

The decision below reflects the deep and seemingly intractable doctrinal confusion that has plagued the lower courts in the wake of *Van Orden*. This confusion has generated a three-way circuit split and lower-court disarray regarding the proper test for evaluating Establishment Clause challenges to passive displays on government property. This Court should clarify this oft-litigated area of the law by applying the analytical approach of the *Van Orden* plurality, as informed by *Lynch v. Donnelly*, 465 U.S. 668 (1984).

Moreover, the Tenth Circuit's decision conflicts with this Court's Establishment Clause precedent. The Tenth Circuit invalidated the challenged roadside memorials by (1) fixating on their cross shape, (2) ignoring most of their features, history, and context, and (3) opining that the Establishment Clause forbids such displays unless the overall setting nullifies any religious significance. Yet this Court in *Lynch*, *Van Orden*, and *Buono* (among other cases discussed below) has denounced each of these analytical missteps. In short, the Tenth Circuit's approach, if allowed to stand, will prohibit the government from accommodating public displays of

religious symbols, forbid a widely embraced means of commemorating fallen heroes on public property, and manifest an unconstitutional hostility toward religion.

Finally, by misclassifying the Association's memorials as government speech, the Tenth Circuit overextended *Summum* and needlessly confused the government-speech doctrine. The decision below stretched *Summum* far beyond its reasonable bounds, declaring that all the Association's memorials are government speech even though, unlike in *Summum*, the State here expressly disclaimed the memorials as its own and some of those displays are not even on public land. This Court, therefore, should grant the writ to demonstrate *Summum*'s proper scope and bring clarity to the government-speech doctrine.

I. This Court Should Grant the Writ Because the Circuits Have Split Three Ways in the Wake of *Van Orden* Concerning the Proper Test for Analyzing the Constitutionality of Passive Displays on Public Property, and this Court's Involvement Is Necessary to Restore Nationwide Uniformity.

A. A Three-Way Circuit Split Exists: The Eighth Circuit Follows the *Van Orden* Plurality; the Fifth and Ninth Circuits Apply Justice Breyer's *Van Orden* Concurrence; and the Second, Sixth, and Tenth Circuits Adhere to the *Lemon*/Endorsement Test.

The Tenth Circuit opined that *Van Orden* generated "confusion" regarding the standard governing Establishment Clause challenges to passive displays on government property. App. 20a. In *Van Orden*, a majority of this Court—the four-justice plurality and Justice Breyer's concurrence—refused to apply the *Lemon*/Endorsement test when analyzing a passive religious display on government land. The plurality's analysis instead considered "the nature of the [display]," "the strong role played by religion and religious traditions throughout our Nation's history," and the Establishment Clause's core concern that "governmental intervention in religious matters [might] itself endanger religious freedom." *Van Orden*, 545 U.S. at 683, 686. Justice Breyer's concurrence, in contrast, emphasized the exercise of "legal judgment" in light of "the context of the display." *Id.* at 700-01.

Subsequently, the appellate courts have split three ways on how to analyze passive displays on public property.

First, the Eighth Circuit, sitting en banc, refused to apply the *Lemon*/Endorsement test to a religious display, opting instead for the *Van Orden* plurality's historically based approach. *See ACLU Nebraska Found. v. City of Plattsmouth*, 419 F.3d 772, 776-77, 778 n.8 (8th Cir. 2005);[5] *cf. Myers v. Loudoun County Pub. Sch.*, 418 F.3d 395, 402-05 (4th Cir. 2005) (Williams, J.) (analyzing an Establishment Clause challenge to the words "under God" in the Pledge of Allegiance by looking to our historical "recognition of religion" in public life).

Second, the Fifth and Ninth Circuits followed Justice Breyer's contextual legal analysis when analyzing passive displays. *See Staley v. Harris County*, 461 F.3d 504, 511-12, 511 n.8 (5th Cir. 2006); *Card v. City of Everett*, 520 F.3d 1009, 1016-17 (9th Cir. 2008). The Ninth Circuit, in particular, applied Justice Breyer's framework to "religious displays that convey a historical or secular message in a non-religious context." *Card*, 520 F.3d at 1016. But further confounding the issue, that court recently confessed bewilderment over which Establishment Clause test to use when analyzing a memorial cross on public land, ultimately asserting

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[5] While the Eighth Circuit mentioned Justice Breyer's concurrence in its recitation of the *Van Orden* decision, its analysis, like that of the *Van Orden* plurality, focused almost exclusively on "the role of religion in our Nation's heritage." *See ACLU Nebraska Found.*, 419 F.3d at 776-77.

that it "need not resolve th[at] issue" because it would reach the same result under either Justice Breyer's analysis or the *Lemon*/Endorsement test. *Trunk v. City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011).

Third, the Second, Sixth, and Tenth Circuits have not followed the *Van Orden* plurality or concurrence, adhering instead to the *Lemon*/Endorsement test. *See Skoros v. City of New York*, 437 F.3d 1, 16-18, 17 n.13 (2d Cir. 2006); *ACLU of Ky. v. Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005); App. 20a.[6]

The circuits are thus in disarray over which test to apply when analyzing Establishment Clause challenges to displays on public property. This Court should grant the writ to bring consistency to this significant and oft-litigated area of constitutional law.

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[6] The *Lemon*/Endorsement test is famously criticized, with the majority of currently sitting justices on record as questioning the application of endorsement analysis to religious displays on public property. *See, e.g.*, *Buono*, 130 S. Ct. at 1819-20 (plurality) (Kennedy, J., joined by Roberts, C.J., and Alito, J.) (reiterating past doubts about the "reasonable observer" standard and its "workability"); *Van Orden*, 545 U.S. at 699-700 (Breyer, J., concurring); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 768 n.3 (1995) (plurality) (Scalia, J., joined by Rehnquist, C.J., and Kennedy and Thomas, JJ.); *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 668-77 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part).

B. The Analytical Model of the *Van Orden* Plurality, as Informed by the *Lynch* Decision, Is the Proper Approach for Analyzing Passive Displays on Public Property.

This case illustrates the pressing need to establish a nationwide standard for analyzing passive displays on public land. The Tenth Circuit's *Lemon*/Endorsement test rests on the premise that a display violates the Establishment Clause simply because a "hypothetical observer could *think*"—even "*mistakenly*"—that it "respect[s] the establishment of religion." App. 101a-102a. Such an expansive standard produces, as this case illustrates, "remarkable" and unjust "use[s] of the 'awesome power' of judicial review." App. 102a. The more reasoned, historically justifiable approach, as the Eighth Circuit has recognized, is to follow the *Van Orden* plurality—a framework informed by the principles expressed in *Lynch*, one of this Court's original display cases—and thereby target the Establishment Clause's reach to those displays that threaten the core concerns animating that constitutional provision.

This analysis focuses on the nature of the display, "the strong role played by religion and religious traditions throughout our Nation's history," and the Establishment Clause's core concern for the potential harm to "religious freedom" created by "governmental intervention in religious matters." *Van Orden*, 545 U.S. at 683, 686. Our history, in short, is replete with official governmental acknowledgments "of the role of religion in American

life," *id.* at 686, evidenced in countless displays—including the Ten Commandments, various religious messages, Biblical citations, and even Latin crosses—on public land throughout our Nation. *Id.* at 688-90. The Association's memorials, like the overseas military cemeteries lined with Latin-cross headstones, *see Buono*, 130 S. Ct. at 1822 (Alito, J., concurring), are an outgrowth of—and directly in line with—our government's extensive tradition of acknowledging religion in public life.

The relevance of history, however, is "not confined" to "whether the challenged practice itself is a part of our accepted traditions dating back to the Founding." *Allegheny*, 492 U.S. at 669 (Kennedy, J., concurring in judgment in part and dissenting in part). Our Nation's historical practices instruct courts concerning the proper meaning and application of the Establishment Clause. *See Marsh v. Chambers*, 463 U.S. 783, 790 (1983); *Lynch*, 465 U.S. at 678. History also illuminates the Clause's "ultimate constitutional objective," *Lynch*, 465 U.S. at 678; which is to protect "religious freedom" from "governmental intervention in religious matters," *Van Orden*, 545 U.S. at 683 (plurality); and prohibit a government-sponsored "ecclesiastical establishment," *Lynch*, 465 U.S. at 678. The Establishment Clause thus forbids only government conduct that, "in reality," violates this objective, "or tends to do so." *Id.* The lesson of history, then, is that the Constitution "permit[s] not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion." *Allegheny*, 492 U.S. at

670 (Kennedy, J., concurring in judgment in part and dissenting in part); *see also Marsh*, 463 U.S. at 791; *Lynch*, 465 U.S. at 681-82.

The State's limited accommodation of the Association's memorials undoubtedly comports with the Establishment Clause under this analytical framework. The State has not intervened in religious matters or jeopardized religious freedom in any way: it has not forced Plaintiffs to revere the memorials, participate in any religious activity, or contribute to religion. *See Allegheny*, 492 U.S. at 664 (Kennedy, J., concurring in judgment in part and dissenting in part); *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 909 (2005) (Scalia, J., dissenting). Neither do these roadside memorials "pose a real danger of establishment of a state church," *Lynch*, 465 U.S. at 686; for the Association is a nonreligious organization, and no religious entity is remotely involved here.[7]

This Court should grant the writ and adopt the *Van Orden*/*Lynch* approach to bring analytical

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[7] Under this analytical framework, a passive display on public property violates the Establishment Clause if it is part of "an obvious effort to proselytize on behalf of a particular religion," *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in judgment in part and dissenting in part), or if its sole "significance" is to advance "religion," *Van Orden*, 545 U.S. at 691-92 (plurality). But here, the challenged memorials do not come close to violating those standards because the nonreligious Association erected these passive memorials, and the State permitted their placement on public land, for the secular purposes of promoting highway safety and commemorating fallen troopers. App. 23a-24a, 26a-27a.

clarity and a uniform standard to this muddled area of constitutional jurisprudence.

II. This Court Should Grant the Writ Because the Tenth Circuit's Endorsement Analysis Conflicts with this Court's Precedent, and this Court's Review Is Needed to Restore Consistency and Coherence.

The Tenth Circuit's endorsement analysis, including its hypothetical "observer," conflicts with this Court's precedent. First, the decision below fixated on the religious connotation of the memorials and presumed, before considering all their features and context, that their presence on public property communicated religious endorsement. Second, the Tenth Circuit ruled that the memorials could not survive Establishment Clause scrutiny unless the overall setting *nullified* any religious significance. Third, the Tenth Circuit's hypothetical "observer" either ignored or spurned critical information that would have been considered by the well-informed reasonable observer discussed in this Court's endorsement cases. These errors illustrate a significant risk of inconsistency among the circuits because, as Judge Gorsuch recognized, the Tenth Circuit "has now *repeatedly* misapplied the 'reasonable observer' test, and it is apparently destined to continue doing so until [it is] told to stop." App. 96a.

A. The Tenth Circuit's Fixation on the Religious Connotation of the Memorials' Cross Shape Conflicts with this Court's Precedent.

The Tenth Circuit made its initial determination of religious endorsement by noting only (1) that the memorials "stand[] alone" on "public land" in the shape of a cross, (2) that the cross is "the preeminent symbol of Christianity," and (3) that the memorials contain the UHP logo. App. 29a. While the court later considered *a few* other features and *some* context of the memorials, it did so only to determine whether those factors "diminish[ed]" or "reduce[d]" its initial assessment of religious endorsement. App. 29a ("diminish"); App. 31a ("reduce"); App. 38a ("diminish"). It was therefore an obsessive focus on the memorials' cross shape that led the court to invalidate them. But that myopic analysis conflicts with this Court's decisions in *Lynch* and *Buono*.

The *Lynch* Court specifically warned against "[f]ocus[ing] exclusively on the religious component" of any display because doing so "would inevitably lead to its invalidation under the Establishment Clause." 465 U.S. at 680. Instead, "the focus of [the] inquiry," the *Lynch* Court said, "must be on the [religious symbol] in [its] context." *Id.* at 679.

The *Buono* plurality similarly rebuked a lower court for "concentrat[ing] solely on the religious aspects of [a] cross [memorial], divorced from its background and context." 130 S. Ct. at 1820. Instead, the proper inquiry is to assess "the message conveyed by the cross" memorial "in the context of

all relevant factors." *Id.*[8] That broader, contextualized inquiry shows that a Latin cross "evokes far more than religion," for it "is not merely a reaffirmation of Christian beliefs," but "a symbol often used to honor and respect . . . heroic acts, noble contributions, and patient striving." *Id.* And even the lead dissenting opinion in *Buono*—authored by Justice Stevens and joined by Justices Ginsburg and Sotomayor—recognized that the "use of a religious symbol in a . . . memorial" would not "indicate government endorsement of a religious message" if the monument "taken as a whole" "may be understood to convey a primarily nonreligious message." *Id.* at 1835 n.7. The memorials challenged here satisfy constitutional scrutiny even under this dissenting analysis because, when viewed in context, their extensive biographical information, UHP logo, and roadside placement convey the nonreligious messages of individualized commemoration and roadway safety.

Notably, the Tenth Circuit's fixation on the religious connotation of the cross shape effectively created a "presumption" against the display of crosses—or other religious symbols—on public property. *See* App. 84a-86a; App. 96a-97a. But such a presumption conflicts with this Court's precedent,

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[8] Justice Breyer's concurrence in *Van Orden* confirmed that the analysis must not fixate on a display's religious connotation. While acknowledging that "the [Ten] Commandments' text undeniably has a religious message," he stressed that "focusing on th[at] text . . . alone cannot conclusively resolve th[e] case." *Van Orden*, 545 U.S. at 700-01. "Rather, to determine the message that the text . . . conveys, [the court] must . . . consider the context of the display." *Id.* at 701.

as evidenced by the three separate occasions that this Court refused Justice Stevens's attempts to create a "presumption against the display of religious symbols on public property." *See Allegheny*, 492 U.S. at 650 (Stevens, J., concurring in part and dissenting in part); *Pinette*, 515 U.S. at 797 (Stevens, J., dissenting); *Van Orden*, 545 U.S. at 708, 721 (2005) (Stevens, J., dissenting). It also collides directly with the *Buono* plurality's acknowledgement that the Establishment Clause "does not require eradication of all religious symbols in the public realm," such as "[a] cross by the side of a public highway marking, for instance, the place where a state trooper perished." 130 S. Ct. at 1818.

The Tenth Circuit's excessive focus on the memorials' religious connotation conflicts not only with this Court's precedent, but also with the other circuits that have followed this Court's guidance. *See Murray v. City of Austin*, 947 F.2d 147, 154-55 (5th Cir. 1991) ("[T]he Supreme Court has rejected focusing exclusively on the religious component of a challenged [display]"); *City of Plattsmouth*, 419 F.3d at 776 ("[F]ocusing on the religious nature of the message alone cannot resolve an Establishment Clause case"); *Mercer County*, 432 F.3d at 639 (similar). Maintaining consistency among the circuits on this issue provides another reason for granting the writ.

B. The Tenth Circuit's Insistence That the Memorials' Overall Context Must Nullify Any Religious Significance Conflicts with this Court's Precedent.

The Tenth Circuit insisted that the memorials could not survive constitutional scrutiny unless their overall context "nullifie[d]" any potentially religious content, App. 32a, and rendered the Latin-cross shape a purely "*secular* symbol" in context, App. 34a. But the Tenth Circuit's nullification standard conflicts with this Court's repeated acknowledgment that the Establishment Clause permits the government to "accommodate" the public display of religious symbols. *See Lynch*, 465 U.S. at 673; *Van Orden*, 545 U.S. at 684, 684 n.3 (plurality); *Buono*, 130 S. Ct. at 1818-19 (plurality).

Indeed, the Tenth Circuit's nullification standard conflicts with what all nine justices in *Van Orden* recognized: that the Ten Commandments monument—an undeniably religious display—need not be stripped of its religious significance to exist on public property. "Simply having religious content" in a display, the plurality noted, "does not run afoul of the Establishment Clause," *Van Orden*, 545 U.S. at 690; and therefore the plurality upheld the monument despite its "religious significance," *id.* Justice Breyer likewise acknowledged that the display "undeniably ha[d] a religious message," while affirming the validity of that display on public property. *Id.* at 700-01. And even the dissenting justices acknowledged that an "obviously religious text" and monument does not offend the endorsement test if, as is true of the Association's

memorials, the setting "indicates that the [displays were] not placed in view with a predominant purpose on the part of government either to adopt the religious message or to urge its acceptance by others." *Id.* at 737 (Souter, J., dissenting); *see also McCreary County*, 545 U.S. at 868-69.

Neither did the *Lynch* Court require that a profoundly religious crèche—a display depicting the hallowed birth of Christ—forfeit its religious meaning; nor did this Court there demand that the crèche represent a purely secular symbol of Christmas. *Cf.* App. 32a, 34a (requiring the cross here to be a "*generic*" or "*secular*" "symbol of death"). The majority instead, after recognizing that the City's crèche retained a "special" religious "meaning" for adherents of the Christian faith, *Lynch*, 465 U.S. at 685, upheld that display "notwithstanding [its] religious significance," *id.* at 687.[9] Similarly, Justice O'Connor, architect of the endorsement test, repeatedly held that her test does not demand that "the religious [or] sectarian significance" of a religious symbol be "neutralized by the setting." *Id.* at 692; *see also Allegheny*, 492 U.S. at 635 (O'Connor, J., concurring) (same).

Buono further illustrates the conflict. The plurality acknowledged that even though the cross is a "Christian symbol" with religious aspects, *Buono*,

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[9] In fact, *Lynch* found that the Establishment Clause is not offended even if the symbol causes "some observers [to] perceive that the [government] has aligned itself with [a particular] faith," because a passive display may "advance religion" in this "indirect" sense. 465 U.S. at 683.

130 S. Ct. at 1816, it is also a symbol "used to honor and respect . . . heroic acts," *id.* at 1820, like commemorating "the place where a state trooper perished," *id.* at 1818. Notably, the plurality did not require that a cross, when used in a commemorative context, shed all religious connotations. To the contrary, Justice Alito's concurrence recognized that the cross memorial "convey[ed] at least two significantly different messages" to its viewers, one religious and one commemorative. *Id.* at 1822.

Indeed, the cross symbol communicates nonreligious messages in many contexts that no other symbol can. This case plainly illustrates that point: a person viewing a stone or square plaque by the side of the road might think that it marks something, but would not understand its significance without close inspection; a roadside cross, however, immediately communicates to passing motorists that a tragic "death occurred here." App. 133a-134a ¶¶ 15-16. Thus, striking down these memorials because they *might* communicate religious significance to *some* observers ultimately deprives the Association—and, more broadly, our collective society—of a widespread communicative symbol, with no adequate substitute to fill the void. *See Allegheny*, 492 U.S. at 618 (Blackmun, J.) (discussing the "absence of a more secular alternative symbol").

Simply put, the Tenth Circuit, by requiring that the Association nullify any potentially religious significance of the memorials, exhibited a "pervasive devotion to the secular" and an "active[] hostility to the religious" in violation of this Court's precedent.

See Van Orden, 545 U.S. at 699 (Breyer, J., concurring) (quoting *Sch. Dist. of Abington Twp. v. Schempp,* 374 U.S. 203, 306 (1963) (Goldberg, J., concurring)). As this Court recently observed, monuments are "interpreted by different observers[] in a variety of ways," *Summum*, 129 S. Ct. at 1135; therefore, requiring that displays be rid of all religious meaning condemns every monument having even tangentially religious significance. For if the Association's memorials—with their admittedly nonreligious purposes and plainly discernable nonreligious messages—cannot withstand scrutiny, the Tenth Circuit's approach, left unchecked, will cause the widespread "eradication of all religious symbols in the public realm," a result contrary to this Court's precedent. *See Buono*, 130 S. Ct. at 1818 (plurality).

C. The Tenth Circuit's Use of a Selectively Informed Observer Conflicts with this Court's Precedent.

The Tenth Circuit considered the perspective of a selectively informed viewer when finding an endorsement of religion here. But in doing so, its analysis broke sharply with this Court's precedent analyzing displays through the eyes of a well-informed observer.

The endorsement test's hypothetical observer is an "unusually informed" onlooker who "knows all the facts and circumstances surrounding a challenged display." *Van Orden*, 545 U.S. at 696 (Thomas, J., concurring); *accord Buono*, 130 S. Ct. at 1819-20 (plurality). He is fully cognizant of the display's

physical features, including the words written on it. *See Allegheny*, 492 U.S. at 598 (noting that the crèche "use[d] words" to make its "meaning unmistakably clear"); *id.* at 619 (considering a display's accompanying sign); *id.* at 635 (O'Connor, J., concurring) (same). But he is far "more informed than the casual passerby," and thus his knowledge is not "limited to the information gleaned simply from viewing the challenged display." *Pinette*, 515 U.S. at 779-80 (O'Connor, J., concurring). In his mind are the complete "history and context" of the display and the local community. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002); *McCreary County*, 545 U.S. at 866. And so imbedded is this information that he cannot "turn a blind eye" to it. *McCreary County*, 545 U.S. at 866.

The Tenth Circuit, in contrast, imbued its observer with very few facts. Concerning the physical features of the memorials, he knew only that they are in the shape of a cross, that the cross is "the preeminent symbol of Christianity," and that the memorials include the UHP logo. App. 29a. But this Court's reasonable observer would have also considered the words written on the memorials, *see Allegheny*, 492 U.S. at 598, 619, 635; which include the fallen trooper's name, trooper designation, rank, and badge number written in large, black, capitalized lettering across a six-foot crossbar, the year of death written beneath it, and the plaque recounting the trooper's service and tragic death, App. 44a ¶¶ 14, 15; App. 6a-7a. These words, particularly those written in large, black letters approximating the size used to write "SPEED

LIMIT" on official highway signs, unmistakably communicate to any reasonably informed observer that the cross is a memorial for a fallen trooper. Also notable is that *all* the words on the memorials reinforce a commemorative message, and none even remotely suggests a religious one.[10]

Furthermore, the Tenth Circuit's observer generally ignored the history surrounding the memorials and did not give weight to their undisputedly nonreligious purpose. App. 26a-27a; App. 27a n.11. This error was critical, as the history here would have dispelled any notion of religious endorsement. It is undisputed that the Association—a private, nonreligious organization—erected the roadside memorial crosses for the nonreligious purposes of commemorating fallen troopers and promoting highway safety and driver caution. App. 45a-46a ¶¶ 19, 25; App. 23a. Indeed, the Utah Legislature confirmed the absence of any religious purpose. App. 111a. The Association selected the cross shape because it is the only symbol, given its historical use, that could simultaneously communicate messages of roadside death, commemoration, and highway safety. App. 45a ¶ 20; App. 7a-8a. And notably, the State's role in the Association's memorials is negligible: it did

[10] Even if, as the Tenth Circuit asserted, the reasonable observer is limited to what a passing motorist driving 55-plus miles per hour could learn, *see* App. 29a-30a—a premise at odds with this Court's precedent, *see Allegheny*, 492 U.S. at 598, 619, 635—the Tenth Circuit's assumption that a passing motorist could discern the 12-inch by 16-inch UHP logo, while missing the 8-inch by 6-*foot* written message on the crossbar, lacks both evidentiary and logical foundation, *see* App. 29a-30a.

not conceive of, design, erect, fund, or maintain the memorials, App. 45a ¶¶ 17, 18; App. 9a; it expressly disclaimed approval of, ownership over, or responsibility for the memorials, App. 9a; App. 128a-129a; it merely allowed the Association to place some of its memorials on public property and acquiesced in the inclusion of the UHP logo. A reasonable observer equipped with this information could not have reached the Tenth Circuit's errant conclusion of religious endorsement.

In addition to ignoring the relevant historical background, the Tenth Circuit's observer also overlooked critical aspects of the memorials' context and roadside placement. The use of roadside crosses to mark the location of a highway death is widespread, *see* App. 34a; App. 110a;[11] and thus the cross shape of the memorials communicates a commemorative message to the reasonable observer; indeed, Plaintiffs admit that the memorials conveyed this very message to them, App. 114a-116a; App. 118a-119a; App. 121a. And the cross shape, by evoking thoughts of roadway fatalities, reminds the reasonable motorist of highway dangers and encourages him to drive safely. App. 46a ¶ 26.[12]

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[11] *See* Holly Everett, *Roadside Crosses in Contemporary Memorial Culture* 15-17 (2002) (recognizing the widespread use of roadside crosses throughout the United States and illustrating, through newspaper articles, magazine stories, and popular fiction, their deep-seated roots in the public consciousness); *id.* at 1 (noting the "long history" of "roadside crosses" in the United States and other countries).

[12] Amici who supported the Association at the circuit-court level agreed (and provided additional information showing) that the cross is widely used, and generally understood, to communicate

To the limited extent that the Tenth Circuit's observer evaluated the memorials' context, he did so selectively, mentioning only that their size is "larger than the crosses typically found on the side of public roads" and thus, he reasoned, that they "convey[] a message of [religious] endorsement." App. 34a-35a. But he failed to consider that the memorials' size is due to the Association's goal of ensuring that motorists passing through the vast Utah landscape could see and immediately discern the message of commemorating a trooper's death. App. 46a-47a ¶¶ 23, 35. Endowed with this information, the well-informed observer would have concluded that the effect of the memorials' size is not to endorse religion, but to communicate nonreligious messages to rapidly passing highway motorists.

The Tenth Circuit's observer thus spurned this Court's precedent by admittedly ignoring relevant features, history, and context of the Association's memorials. This raises an important constitutional question because, unless this Court corrects this blatant disregard of its case law, the courts of

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commemorative and public-safety messages. *See, e.g.*, Brief of Amicus Curiae Robert E. Mackey, *American Atheists v. Davenport*, No. 08-4061 (10th Cir. 2010), 2008 WL 4972696 (discussing the nonreligious use of cross memorials to mark and commemorate the deaths of firefighters in Colorado); Brief Amici Curiae of the State of Colorado et al., *American Atheists v. Davenport*, No. 08-4061 (10th Cir. 2010), 2008 WL 6058881 (discussing other States that permit private citizens to erect cross-shaped roadside memorials); Brief of Utah Legislators Amici Curiae et al., *American Atheists v. Davenport*, No. 08-4061 (10th Cir. 2010), 2008 WL 4972694 (discussing the widespread and various uses of memorial crosses).

appeals will reach their decisions in Establishment Clause display cases using what the dissenting judges rightly characterized as a myopic and selectively informed observer—an analytical tool incapable of consistent results. *See* App. 86a-92a; App. 96a-99a; *Pinette*, 515 U.S. at 768 n.3 (plurality).

The implications of this case reach beyond roadside memorial crosses. The cross is widely used, even outside the roadside context, as a marker signifying (and a memorial commemorating) the location of a tragic death. The record, despite the appellate court's contrary assertion, *see* App. 32a, contains ample support for this, including evidence from citizens who, for nonreligious, commemorative reasons, placed granite crosses on public land to memorialize the location where brave firefighters died battling forest fires, App. 123a-126a; *see also supra* n.12. This case, therefore, presents issues of far-reaching import: whether the memorials for these (and other) heroes will be impertinently tossed aside or respectfully embraced as part of our constitutional traditions. *See Buono*, 130 S. Ct. at 1817 (plurality). This Court should thus grant the writ to decide that critical question.

III. This Court Should Grant the Writ to Clarify the Government-Speech Doctrine and Demonstrate the Proper Scope of *Summum*.

The Association's memorials are its own private expression, yet the Tenth Circuit misconstrued *Summum* and improperly classified the memorials as "government speech," concluding that those displays (even the three on private property) "fall

squarely within the rule pronounced" in *Summum*. App. 15a. But this case is materially different from *Summum*. Of the many distinguishing factors, two are particularly significant. That the Tenth Circuit dismissed these differences illustrates that other courts are susceptible to similarly flawed views of that case. This Court should thus grant the writ and quash this misunderstanding of *Summum* before it proliferates.

First, the State in this case, through its written agreement with the Association, refused ownership of the memorials, disclaimed them as its own, and renounced responsibility to defend them or their Latin-cross shape. App. 128a-129a. This express disclaimer shows that the memorials are not government speech, but the Association's own private expression. *See Board of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000) (holding that the challenged speech was private because the government "ha[d] disclaimed that the speech [was] its own"); *see also id.* at 241 n.8 (Souter, J., concurring) ("[The majority] h[e]ld that the mere fact that the [government] disclaims speech as its own expression takes it out of the scope of . . . government directed speech"); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 834-35 (1995) (holding that the challenged speech—publications of university-recognized organizations—was private because the government, in its written agreement with those organizations, "declare[d] that the [private] groups . . . are not [its] agents, are not subject to its control, and are not its responsibility").

In contrast, the government in *Summum* did not disclaim the monuments under consideration, and thus that case does not control here. The Tenth Circuit, however, in its attempt to dismiss the State's express disclaimer, unpersuasively relied upon *Summum*'s rejection of the "argument that, in order for a monument to constitute government speech, the state must formally adopt the message." App. 17a. But that portion of the *Summum* opinion considers what is required for the government to *adopt* a privately inspired message as its own; it does not address the situation at hand, where the government expressly *disclaims* responsibility for or ownership of a private message. The Tenth Circuit thus erred by disregarding this decisive distinction and attempting to justify its decision through a distortion of *Summum*'s analysis.

Second, three of the Association's 13 memorials are on private land, App. 43a ¶ 9, whereas all 15 displays considered in *Summum* were on public property, 129 S. Ct. at 1129. Unlike the monuments in *Summum*, the Association's unified collection of memorials, spanning both public and private land, necessarily constitutes private speech, for only the private entity (the Association) was responsible for and involved in the display of all 13 memorials. Otherwise, an anomalous result will occur, senselessly bifurcating the Association's cohesive expressive program, and classifying identical displays differently. The Tenth Circuit thus erred by failing to acknowledge this additional distinction between this case and *Summum*.

Summum indeed recognized that "there are limited circumstances" where a "permanent monument" might properly be characterized as private speech. *Id.* at 1138; *see also id.* at 1132 (noting that there "may be situations" where "[p]ermanent monuments" do not "represent government speech"). This is one of those situations. The Association's memorials, much like graveside headstones on public land, were approved by surviving family members, erected by the deceased's comrades, and placed in meaningful locations for the purpose of individually memorializing the fallen, App. 43a-45a ¶¶ 6, 7, 13, 17, 19; thus they "do[] not look like government speech at all," and it was error for the Tenth Circuit to treat them as such, *see Summum*, 129 S. Ct. at 1142 (Souter, J., concurring) (discussing religious symbols marking death in a government cemetery).

Summum is thus inapposite, and this Court should take this early opportunity to clarify the scope of that decision by granting review in this case.

CONCLUSION

For the foregoing reasons, the Association respectfully requests that this Court grant the writ.

Respectfully submitted,

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April 15, 2011

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Filed December 20, 2010

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

AMERICAN ATHEISTS, INC., a Texas non-profit corporation; R. ANDREWS; S. CLARK; and M. RIVERS,

Plaintiffs-Appellants,

v.

SCOTT T. DUNCAN, Colonel, Superintendent of Utah Highway Patrol; LANCE DAVENPORT, Superintendent, Utah Highway Patrol, in his official capacity; JOHN NJORD, Executive Director, Utah Department of Transportation; and F. KEITH STEPAN, Director Division of Facilities Construction and Management Department of Administrative Services,

Defendants-Appellees,

and

UTAH HIGHWAY PATROL ASSOCIATION,

Defendant-Intervenor-Appellee,

No. 08-4061

THE UNITARIAN UNIVERSALIST ASSOCIATION; THE UNION FOR REFORM JUDAISM; THE SOCIETY FOR HUMANISTIC JUDAISM; THE INTERFAITH ALLIANCE; THE HINDU AMERICAN FOUNDATION; THE ANTI-DEFAMATION LEAGUE; EUGENE J. FISHER; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; AMERICAN HUMANIST ASSOCIATION; FOUNDATION FOR MORAL LAW; ROBERT E. MACKEY; THE AMERICAN LEGION; STATE OF COLORADO; STATE OF KANSAS; STATE OF NEW MEXICO; STATE OF OKLAHOMA; THE BECKET FUND FOR RELIGIOUS LIBERTY; GREGORY BELL; CURTIS BRAMBLE; ALLEN CHRISTENSEN; DAVID CLARK; MARGARET DAYTON; BRAD DEE; DAN EASTMAN; JOHN GREINER; WAYNE HARPER; JOHN HICKMAN; LYLE HILLYARD; SHELDON KILLPACK; PETER KNUDSON; MICHAEL MORLEY; WAYNE NIEDERHAUSER; HOWARD STEPHENSON; DENNIS STOWELL; AARON TILTON; JOHN VALENTINE; KEVIN VANTASSELL; CARLENE

WALKER; CITY OF SANTA FE;
UTAH SHERIFFS' ASSOCIATION,

Amici Curiae.

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:05-CV-00994-DS)

Brian M. Barnard of Utah Civil Rights & Liberties Foundation, Inc., Salt Lake City, Utah, for Plaintiffs-Appellants.

Thom D. Roberts, Assistant Utah Attorney General (Mark L. Shurtleff, Attorney General, with him on brief), Salt Lake City, Utah, for Defendants-Appellees.

Byron J. Babione of Alliance Defense Fund (Benjamin W. Bull and David R. Sheasby of Alliance Defense Fund, Scottsdale, Arizona, Frank D. Mylar of Mylar Law P.C., Cottonwood Heights, Utah, and Steven Fitschen of The National Legal Foundation, Virginia Beach, Virginia, with him on brief), Scottsdale, Arizona, for Defendant-Intervenor-Appellee.

Luke W. Goodrich of The Becket Fund for Religious Liberty, Washington, D.C. (Eric C. Rassbach of The Becket Fund for Religious Liberty, Washington, D.C., Steve Six, Attorney General, Topeka, Kansas, Gary K. King, Attorney General, Santa Fe, New Mexico, W.A. Drew Edmondson, Attorney General, Oklahoma City, Oklahoma, John W. Suthers,

Attorney General, Denver, Colorado, Daniel D. Domenico, Solicitor General, Denver, Colorado, and Geoffrey N. Blue, Deputy Attorney General, Denver, Colorado, with him on the brief) for Amici Curiae, the States of Colorado, Kansas, New Mexico, and Oklahoma, and The Becket Fund for Religious Liberty, in support of Defendants-Appellees.

Robert V. Ritter of Appignani Humanist Legal Center, American Humanist Association, Washington, D.C., filed an amici curiae brief for American Humanist Association, Society for Humanistic Judaism, and Unitarian Universalist Association, in support of Plaintiffs-Appellants.

Evan M. Tager and David M. Gossett of Mayer Brown LLP, Washington, D.C., and Brian M. Willen of Mayer Brown LLP, New York, New York, Steven M. Freeman, Steven C. Sheinberg, and Michelle N. Deutchman of Anti-Defamation League, New York, New York, Mark J. Pelavin of Union for Reform Judaism, Washington, D.C., Ayesha N. Khan and Richard B. Katskee of Americans United for Separation of Church and State, Washington, D.C., and Suhag A. Shukla of Hindu American Foundation, Kensington, Maryland, filed an amici curiae brief for Americans United for Separation of Church and State, The Anti-Defamation League, The Hindu American Foundation, The Interfaith Alliance, The Union for Reform Judaism, and Dr. Eugene Fisher, in support of Plaintiffs-Appellants.

Roy S. Moore, John A. Eidsmoe, and Benjamin D. DuPrè for Foundation for Moral Law, Montgomery,

Alabama, filed an amicus curiae brief for Foundation for Moral Law, in support of Defendants-Appellees.

Michael A. Sink of Perkins Coie LLP, Denver, Colorado, filed an amicus curiae brief for Robert E. Mackey, in support of Defendants-Appellees.

John Ansbro of Orrick, Herrington, & Sutcliffe LLP, New York, New York, filed an amicus curiae brief for The American Legion, in support of Defendants-Appellees.

Chad N. Boudreaux and Adam J. White of Baker Botts, LLP, Washington, D.C., filed an amici curiae brief on behalf of Gregory Bell, Curtis Bramble, Allen Christensen, David Clark, Margaret Dayton, Brad Dee, Dan Eastman, John Greiner, Wayne Harper, John Hickman, Lyle Hillyard, Sheldon Killpack, Peter Knudson, Michael Morley, Wayne Niederhauser, Howard Stephenson, Dennis Stowell, Aaron Tilton, John Valentine, Kevin Van Tassell and Carlene Walker (collectively "Utah Legislators") and City of Santa Fe, in support of Defendants-Appellees.

Kevin T. Snider of Pacific Justice Institute, Sacramento, California, filed an amicus curiae brief for Utah Sheriffs' Association, in support of Defendants-Appellees.

Before **TACHA, EBEL,** and **HARTZ**, Circuit Judges.

EBEL, Circuit Judge.

The Utah Highway Patrol Association ("UHPA"), with the permission of Utah state authorities, erected a number of twelve-foot high crosses on public land to memorialize fallen Utah Highway Patrol ("UHP") troopers. Plaintiffs-Appellants, American Atheists, Inc., a Texas non-profit organization, and three individual members of American Atheists who reside in Utah, challenge the legality of these memorials under the Establishment Clause of the federal constitution and Article I of Utah's constitution. We hold that these memorials have the impermissible effect of conveying to the reasonable observer the message that the State prefers or otherwise endorses a certain religion. They therefore violate the Establishment Clause of the federal constitution. In light of this conclusion, we need not reach the separate question of whether these displays also violate Utah's constitution.

I. Background

UHPA, a non-profit organization that supports UHP officers and their families, initiated the memorial project in 1998. The memorials are twelve-foot high crosses with six-foot horizontal cross-bars. The fallen trooper's name, rank, and badge number are printed in large letters on the horizontal cross-bar. Immediately underneath the place where the two bars meet hangs a large (approximately 12" high and 16" wide) depiction of the UHP's official "beehive" symbol. Beneath that are printed the year the trooper died and a small plaque containing a

picture of the trooper and some biographical information.[1]

UHPA member and officer Lee Perry and his friend Robert Kirby came up with the idea for these memorials and designed the crosses, which UHPA approved. UHPA asserts that

> [t]he purpose of these memorials is fourfold: (1) the memorials stand as a lasting reminder to UHPA members and Utah highway patrol troopers that a fellow trooper gave his life in service to this state; (2) the memorials remind highway drivers that a trooper died in order to make the state safe for all citizens; (3) the memorials honor the trooper and the sacrifice he and his family made for the State of Utah; and (4) encourage safe conduct on the highways.

(Aple. Supp. App. at 3112.) Perry and Kirby determined that "only a cross could effectively convey these weighty messages instantaneously" to motorists driving by a memorial. (*Id.* at 3165.) According to Perry, they chose a white Roman or Latin cross because

> only a white cross could effectively convey the simultaneous messages of death, honor, remembrance, gratitude, sacrifice, and safety. I determined this because a cross is widely recognized as a memorial for a

[1]Photos of some of these displays are attached to this opinion.

> person's death and especially respect to those who have given their lives to insure the safety and protection of others.

(Aplt. App. at 420.) Moreover, a "cross, near the highway, with the inscriptions, symbols and plaques mentioned above, conveys the unmistakable message that a Utah Highway Patrolman died near this spot while serving the people of Utah." (*Id.* at 423.)

Because generally drivers would be passing a memorial at 55-plus miles per hour, the UHPA determined that the cross memorials "needed to prominently communicate all of this instantaneously." (Aple. Supp. App. at 3165.) Further, to "effectively communicate these messages," the UHPA sought "to place each cross in a location that was: (1) visible to the public; (2) safe to stop and view; and (3) as close to the actual spot of the trooper's death as possible." (*Id.*)

Before erecting any memorial, the UHPA obtained the consent of the fallen trooper's family. None of these families have ever objected to the use of the cross as a memorial or requested that the UHPA memorialize their loved one using a different symbol. However, "[b]ecause [the UHPA] exist[s] to serve family members of highway patrolmen, the UHPA would provide another memorial symbol if requested by the family."[2] (Aplt. App. at 1869.)

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[2]Notwithstanding the UHPA's position, the State Defendants, in oral argument before the district court and in their briefs and argument before us, asserted that they would

UHPA erected its first memorial cross in 1998 on private property located approximately fifty feet from a state highway. Later, UHPA obtained permission from the State of Utah to erect additional memorial crosses on public property, including the rights-of-way adjacent to the State's roads, roadside rest areas, and the lawn outside a UHP office in Salt Lake County.[3] In permitting the memorials, however, the State has, on at least one occasion, expressly noted that it "neither approves or disapproves the memorial marker." (*Id.* at 2303.)

Between 1998 and 2003, the UHPA erected a total of thirteen memorials. The memorials are all privately funded; UHPA retains ownership of the memorials and maintains them, while the State continues to own and control the state land on which some of the memorials are located. Local businesses and Boy Scout troops have aided the UHPA in funding, building and maintaining the memorial crosses.

II. This litigation

Plaintiffs brought this suit under 42 U.S.C. § 1983 and Article I of the Utah Constitution against several state employees who were responsible for authorizing the UHPA to incorporate the UHP logo

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not allow any change in the memorial, whether to accommodate other faiths or otherwise.

[3]A photo depicting the lawn outside this UHP office, where all of one and part of the other of these two memorial crosses are visible, is attached to this opinion.

on the memorial crosses and to place of some of these crosses on state land.[4] Although Plaintiffs initially alleged violations of both the establishment and "free expression" clauses of these constitutions, Plaintiffs later dismissed their "free expression" claims. Based upon the alleged establishment clause violations, Plaintiffs seek, as relief, $1 in nominal damages, an injunction ordering the removal of these memorial crosses from state property, an injunction ordering that the UHP insignia be removed from all UHPA memorial crosses, a declaration that these memorial crosses' presence on state property violates Plaintiffs' constitutional rights, a declaration that it is a constitutional violation to allow the UHP insignia to be placed on these memorial crosses, and attorneys' fees. The district court allowed UHPA to intervene as a party-defendant.

Upon the parties' cross-motions for summary judgment, the district court denied Plaintiffs' motions and granted summary judgment for all Defendants, holding that these memorial crosses did not violate the federal or state constitution. *See American Atheists, Inc. v. Duncan*, 528 F. Supp. 2d 1245 (D. Utah 2007). Plaintiffs timely appealed that decision. We have jurisdiction to consider this appeal

[4]UHPA asserts that federal courts do not have subject matter jurisdiction to consider Establishment Clause claims asserted under 42 U.S.C. § 1983. This court, however, has previously rejected that argument. *See Green v. Haskell County Bd. of Comm'rs*, 568 F.3d 784, 788 n.1 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1687 (2010).

pursuant to 28 U.S.C. § 1291.[5] *See Green*, 568 F.3d at 788.

III. Analysis

A. Standing

As a threshold matter, we must determine whether Plaintiffs have Article III standing to bring this case. *See O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1222 (10th Cir. 2005). The district court held that Plaintiffs had standing because they "have experienced direct and unwelcome contact with the memorial crosses at issue in this case . . . . [and] would have to alter their commutes in order to avoid contact with the memorials." *American Atheists*, 528

[5]This court delayed issuing this opinion, awaiting the Supreme Court's decision in *Salazar v. Buono*, 130 S. Ct. 1803 (2010). *Buono* initially involved an Establishment Clause challenge to private citizens' erecting a white cross on federal land as a war memorial. *See id.* at 1811-12. The Ninth Circuit held that violated the Establishment Clause, a decision the defendants did not appeal. *See id.* at 1812-13. The Supreme Court, thus, did not address the merits of the Establishment Clause claim, but instead addressed a later procedural development, considering, instead, the plaintiff's attempt to enforce the judgment he obtained against the display of the cross on public land, in light of the government's subsequent transfer of the land at issue to private concerns. *See id.* at 1811-13, 1815-16 (Kennedy, J., joined by Roberts, C.J., and Alito, J); *id.* at 1824-25 (Scalia, J, joined by Thomas, J., concurring in the judgment); *id.* at 1828 (Stevens, J, joined by Ginsburg and Sotomayor, J., dissenting); *id.* at 1842-43 (Breyer, J., dissenting). The Court upheld the land transfer against the plaintiff's challenge. *See id.* at 1811 (Kennedy, J., joined by Roberts, C.J., and Alito, J); *id.* at 1824-25 (Scalia, J, joined by Thomas, J., concurring in the judgment).

F. Supp. 2d at 1251. "We review the question of whether a plaintiff has constitutional standing de novo." *Green*, 568 F.3d at 792.

"To demonstrate standing, a plaintiff must allege actual or threatened personal injury, fairly traceable to the defendant's unlawful conduct and likely to be redressed by a favorable decision of the court." *Foremaster v. City of St. George*, 882 F.2d 1485, 1487 (10th Cir. 1989). In Establishment Clause cases, "[a]llegations of personal contact with a state-sponsored image suffice to demonstrate this kind of direct injury." *O'Connor*, 416 F.3d at 1223.

Here, the individual named plaintiffs allege to have had "direct personal and unwelcome contact with the crosses." (Aplt. App. at 587, 596, and 682.) Under *O'Connor*, 416 F.3d at 1223, these allegations establish standing. *See also Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1028-29 (10th Cir. 2008). Mr. Andrews, one of the named plaintiffs, also stated that he has "occasionally altered [his] travel route or [has] not stopped at a particular rest stop to avoid contact with the crosses." (Aplt. App. at 596.) Mr. Andrews's allegation that he was "forced to alter [his] behavior to avoid contact with the display, although not necessary for standing, further support[s] this conclusion." *O'Connor*, 416 F.3d at 1223. "Moreover, the Plaintiffs-Appellants' alleged injuries stem directly from the conduct of the [State] . . . . Lastly . . . a favorable judgment from the federal court would redress the injuries. As such, the Plaintiffs-Appellants have standing to pursue [this

case] before this court." *Weinbaum*, 541 F.3d at 1028-29.

Because the individual named plaintiffs here have standing, this court does not need to determine whether American Atheists would also have standing in its own right. *See Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981) (determining that because one of the plaintiffs "has standing, we do not consider the standing of the other plaintiffs"); *see also Green*, 568 F.3d at 793 n.5 ("Because we conclude that [Plaintiff-Appellant] Mr. Green has standing, . . . it is unnecessary to address the ACLU of Oklahoma's standing.").

B. Whether the district court abused its discretion in striking the declarations of O. Salah and D. Chatterjee

The district court ordered the parties, when submitting declarations, to identify which motion those declarations supported. The court further warned the parties that "[f]ailure to identify the declarations in this manner will result in their being stricken and not considered by the court." (D. Ct. doc. 132.) Subsequent to the district court's order, Plaintiffs submitted to the court the declarations of O. Salah and D. Chatterjee, but failed to identify the motion Plaintiffs sought to support with those declarations. The district court, therefore, struck them. The court did not abuse its discretion in doing so.[6] *See Jones v. Barnhart*, 349 F.3d 1260, 1270 (10th

[6]In striking these declarations, the district court also noted that D. Chatterjee's declaration appears to be an attempt by

Cir. 2003) (reviewing decision regarding motion to strike for an abuse of discretion).

C. Whether the Free Speech Clause Protects these Cross Memorials from Establishment Clause Scrutiny

As an initial matter, UHPA argues that the displays at issue in this case are UHPA's private speech, not the expression of the state of Utah and, therefore, that the Free Speech Clause, not the Establishment Clause, should govern our analysis in this case. Further, UHPA asserts that Utah would violate the Free Speech Clause by prohibiting the displays at issue in this case and, therefore, that the Establishment Clause cannot mandate the prohibition of these displays. The UHPA is supported in this position by amici curiae, the States of Colorado, Kansas, New Mexico, and Oklahoma, and The Becket Fund for Religious Liberty. These arguments fail in light of the Supreme Court's recent decision in *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009).

In *Pleasant Grove City*, the Supreme Court held that "[j]ust as government-commissioned and

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Plaintiffs "to submit expert testimony under the guise of lay opinion testimony. The Chatterjee declaration is inadmissible because he was never identified as an expert and his testimony does not fit any other admissible category." (Aplt. App. at 2904-05.) We need not address the propriety of this additional reason for striking Chatterjee's declaration because the district court was justified in striking both declarations due to Plaintiffs' failure to identify which motions these declarations were intended to support.

government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land." *Id.* at 1133. Thus, the Court concluded, "as a general matter, [the Free Speech Clause's] forum analysis simply does not apply to the installation of permanent monuments on public property." *Id.* at 1138.

As permanent monuments erected on public land,[7] the cross memorials at issue in this case fall squarely within the rule pronounced by the Court in *Pleasant Grove City* and, therefore, must be analyzed not as private speech, but as government speech—the scope and content of which is restrained, inter alia, by the Establishment Clause. *See id.* at 1131-32; *see also Green*, 568 F.3d at 797 n.8.

Both at oral argument and in a letter submitted pursuant to Fed. R. App. P. 28 (j), the state amici and the Becket Fund for Religious Liberty attempt to distinguish this case from *Pleasant Grove City*, arguing that even in light of the Court's opinion in *Pleasant Grove City*, the displays at issue in this case should be treated as private speech. They argue that *Pleasant Grove City* can be distinguished from our case in three ways: (1) in *Pleasant Grove City*, the city took ownership of the displays at issue, while in this case, the UHPA has retained ownership of the memorial crosses; (2) Utah has distanced itself

[7]Although it appears that at least one memorial is located on private land, the UHPA does not base its argument on that fact.

from the message conveyed in these displays by issuing a statement that the Utah Department of Transportation "neither approves or disapproves the memorial marker" (Aplt. App. at 2303); and (3) unlike the displays at issue in *Pleasant Grove City*, these displays are not really permanent because both Utah and the UHPA retain the right to remove the display at any time. These distinctions are unpersuasive.

The fact that the UHPA retains ownership over these displays does not materially affect our analysis of whether the displays at issue in this case constitute government speech. In *Pleasant Grove City*, the Supreme Court noted that the city had taken ownership of "*most* of the monuments in the Park." 129 S. Ct. at 1134 (emphasis added). However, the Court gave no indication that only those monuments which the city actually owned constituted government speech. To the contrary, the Court strongly implied that all the monuments in that park were government speech, and further indicated that, in the vast majority of cases, a permanent monument on public land will be considered government speech. *Id.* at 1138. The fact that the Court thought all of the monuments in that park were government speech is perhaps best illustrated by the Court's choice of an example of a permanent monument on public land that would not be government speech: a "monument on which all the residents . . . could place the name of a person to be honored or some other private message." *Id.* The Court's choice to use a hypothetical example, and not just to point to some of the memorials in the park at

issue that might be privately owned in that case indicates that the Court considered all the monuments in that park to be government speech. Thus, the fact that the UHPA, not Utah, owns the memorial crosses does not affect our determination of whether they are government speech.

Similarly, Utah's attempt to distance itself from the message conveyed by these memorial crosses, by stating that it neither "approves or disapproves" them, falls flat in light of the Supreme Court's discussion in *Pleasant Grove City*. In *Pleasant Grove City*, the Court explicitly rejected the respondent's argument that, in order for a monument to constitute government speech, the state must formally adopt the message conveyed by the display. The Court noted that the City's decision to display that permanent monument on its property "provided a more dramatic form of adoption than the sort of formal endorsement that respondent would demand . . . ." *Id.* at 1134. Conversely, the government's actions in this case—allowing these memorial crosses to be displayed with the official UHP insignia primarily on public land—cannot be overshadowed by its attempts to distance itself from the message conveyed by these displays.

Finally, we reject the state amici's contention that, because the UHPA and Utah each retained the right to remove these displays, they are not "permanent" and, therefore, the Court's decision in *Pleasant Grove City* does not cover this case. This project began more than ten years ago, and there is no evidence that any of the memorial crosses erected

since that time have been removed. We think that is permanent enough to constitute government speech. *See id.* at 1138 (contrasting the "permanent" displays at issue in that case with the "temporary" sixteen-day display at issue in *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995)).[8]

D. Federal Establishment Clause claim

1. *Standard of Review*

This court reviews de novo a district court's decision in a First Amendment case, *O'Connor*, 416 F.3d at 1223; *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1230 n.7 (10th Cir. 1998) (en banc), and undertakes "an independent examination of the whole record." *O'Connor*, 416 F.3d at 1223; *see also Weinbaum*, 541 F.3d at 1029 ("We review *de novo* a district court's findings of constitutional fact and its ultimate conclusions regarding a First Amendment challenge.") (internal citations and quotations

[8]At oral argument, the state amici also argued that this case is distinguishable from *Pleasant Grove City* because the memorials in this case were erected in places like the sides of the road, where space is less scarce than in public parks. We also find this distinction unpersuasive. Surely, the memorials placed in front of the UHP office are on land that is no less scarce than the land in most parks. Further, as the record in this case demonstrates, the State tightly controls the displays placed on the rights-of-way near its roads and, although those rights-of-way may cover a larger geographic area than the state's parks (an allegation we are unwilling to accept on the amici's say so), safety concerns and statutes like the federal Highway Beautification Act, 23 U.S.C. § 131, severely limit the area where memorials or other monuments could be displayed.

omitted). "More specifically, in Establishment Clause cases, we consider 'a district court's findings on each part of the *Lemon*[*v. Kurtzman*, 403 U.S. 602 (1971)] test' to be 'constitutional facts'" that we review de novo. *Green*, 568 F.3d at 795-96 (quoting *Robinson v. City of Edmond*, 68 F.3d 1226, 1230 n.7 (10th Cir. 1995)). Where, as here, the district court granted summary judgment for Defendants, "we must ensure that 'there is no genuine issue as to any material fact' and that [Defendants are] 'entitled to judgment as a matter of law.'" *Weinbaum*, 541 F.3d at 1029 (quoting Fed. R. Civ. P. 56(c)). In so doing, this court "view[s] the evidence and draw[s] reasonable inferences therefrom in the light most favorable to the nonmoving party." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006) (quoting *Keys Youth Servs., Inc. v. City of Olathe*, 248 F.3d 1267, 1270 (10th Cir. 2001)).

2. *The Lemon/Endorsement Test*

"The first clause of the First Amendment provides, 'Congress shall make no law respecting an establishment of religion . . . .' U.S. Const. amend. I. This substantive limitation applies also to the 'legislative power of the States and their political subdivisions' as a result of the Fourteenth Amendment." *Weinbaum*, 541 F.3d at 1029 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000)). The Establishment Clause "enshrines the principle that government may not act in ways that 'aid one religion, aid all religions, or prefer one religion over another.'" *Id.* (quoting *Snyder*, 159 F.3d at 1230); *see also County of Allegheny v. Am. Civil*

Liberties Union, 492 U.S. 573, 590 (1989) (stating that the Establishment Clause guarantees "religious liberty and equality to 'the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism'") (quoting *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985)). This concept is not, however, as simple as it may sound, and courts have struggled mightily to articulate when government action has crossed the constitutional line. *See Bauchman ex. rel. Bauchman v. W. High Sch.*, 132 F.3d 542, 551 (10th Cir. 1997) (noting the Supreme Court's failure to "prescribe a general analytic framework within which to evaluate Establishment Clause claims," and that "many believe the Court's modern Establishment Clause jurisprudence is in hopeless disarray") (citation and quotation omitted).

Although the Supreme Court is sharply divided on the standard governing Establishment Clause cases, see *Green*, 568 F.3d at 797 n.8 (discussing the confusion generated by the Supreme Court's decision in *Van Orden v. Perry*, 545 U.S. 677 (2005)), this court has recently affirmed that "the touchstone for Establishment Clause analysis remains the tripartite test set out in *Lemon*." *Green*, 568 F.3d at 796 (quoting *Weinbaum*, 541 F.3d at 1030); *see also Gonzales v. N. Tp. of Lake County*, 4 F.3d 1412, 1417-18 (7th Cir. 1993) ("Although the test is much maligned, the Supreme Court recently reminded us that *Lemon* is controlling precedent and should be the framework used by courts when reviewing Establishment Clause challenges.").

The Court in *Lemon* established three general tests to determine whether a state has violated the principles protected by the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-13 (citations and quotations omitted). If any of these tests are violated, the state practice will be deemed unconstitutional. *See Green*, 568 F.3d at 797-98 ("A governmental action violates the Establishment Clause if it fails to satisfy *any* of three prongs of the Lemon test.") (emphasis in original). On appeal, Plaintiffs argue that Defendants have violated the first and second Lemon tests.

Addressing the first and second *Lemon* tests, "[t]his court 'interpret[s] the purpose and effect prongs of *Lemon* in light of Justice O'Connor's endorsement test.'" *Weinbaum*, 541 F.3d at 1030 (quoting O'Connor, 416 F.3d at 1224); *see also Bauchman*, 132 F.3d at 552 ("Justice O'Connor's 'endorsement test' is now widely accepted as the controlling analytical framework for evaluating Establishment Clause claims."). Under that test, "[t]he purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J.,

concurring). Justice O'Connor's modification of the *Lemon* test makes our inquiry very case-specific, as it asks this court to examine carefully the particular context and history of these displays before concluding what effect they would likely have on the reasonable observer.[9] *See County of Allegheny*, 492 U.S. at 605-08 (defending the fact-specific nature of the Court's Establishment Clause jurisprudence which requires that courts "examine[] the particular contexts in which the government employs religious symbols").

3. *Plaintiffs Have Failed to Establish a Violation of the Purpose Prong of the Lemon Test*

The question presented by the first prong of the *Lemon* test, then, is "whether the government conduct was motivated by an intent to endorse religion." *Weinbaum*, 541 F.3d at 1030. "In deciding whether the government's purpose was improper, a court must view the conduct through the eyes of an 'objective observer,' one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act." *Id.* at 1031 (quotations omitted). "We will not lightly attribute unconstitutional motives to the government, particularly where we can discern a plausible secular purpose." *Id.* (quotation, alteration omitted).

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[9]We reject Plaintiffs' argument that any time government conduct involves the use of a Latin cross, there is an Establishment Clause violation.

Here, we can discern a plausible secular purpose. Considering first the evidence of the UHPA's motivation, that organization has, throughout the course of this project, consistently asserted that its intent in erecting these memorials is only secular: to honor fallen troopers and to promote safety on the State's highways. The secular nature of the UHPA motive is bolstered by the fact that the memorials were designed by two individuals who are members of the Mormon faith, the Church of Jesus Christ of Latter Saints ("LDS Church"), a religion that does not use the cross as a religious symbol. These men explained that they were inspired to use the Latin cross for the fallen trooper memorials because of the presence of such crosses in military cemeteries, which honor fallen service members for their sacrifice, and roadside memorials found where traffic fatalities have occurred. Plaintiffs are unable to point to any evidence suggesting that the UHPA's motive is other than secular.

Nevertheless, the focus of this first *Lemon* test is on the *government's* purpose, and not that of a private actor. *See Green*, 568 F.3d at 800 n.10. But in this case the evidence supports our attributing the UHPA's motivation to the State Defendants. In allowing the UHPA to use the UHP insignia on the memorial crosses and in giving UHPA permission to place some of those crosses on public land, state officials accepted the UHPA's assertion of its motives and further acknowledged support for the UHPA's intent. Plaintiffs have failed to present any evidence that, to the contrary, suggested that the State

Defendants' motivation was different than that expressed by UHPA.[10]

Furthermore, in light of this evidence, there is no reason to conclude that the Defendants' proffered secular explanations were a sham. *See Weinbaum*, 541 F.3d at 1031 ("Unless the secular justification is a 'sham' or is 'secondary' to a religious purpose, we defer to the government's professed purpose for using the symbol.") (citation omitted). Nor can we say that the secular purpose advanced by Defendants is so implausible that they must have actually been motivated by a religious purpose, even if there is no direct evidence of such a purpose. *Cf. Gilfillan v. City of Philadelphia*, 637 F.2d 924, 930 (3rd Cir. 1980) (holding that Philadelphia's decision to build a massive stage adorned with a thirty-six-foot cross in preparation for the Pope's visit violated the purpose prong of the Establishment Clause despite the city's claim that its purpose in building this structure was for public relations, not to endorse a religion). Therefore, we uphold the district court's determination that the State Defendants did not violate Lemon's first test by acting with the impermissible motive of endorsing or favoring religion.

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[10]Plaintiffs argue that the State Defendants failed to present any evidence of their actual motive in permitting UHPA to use the UHP insignia and to place some of the memorials on public land. But Plaintiffs bear the burden of proving that the State Defendants have violated the Establishment Clause. *See Brooks v. City of Oak Ridge*, 222 F.3d 259, 265 n.4 (6th Cir. 2000).

4. *UHPA's Memorial Crosses Violate the Effect Prong of the Lemon/Endorsement Test*

Next, we consider whether the State Defendants violated the second *Lemon* test. The Establishment Clause "mandate[s] governmental neutrality between religion and religion, and between religion and non-religion." *Weinbaum*, 541 F.3d at 1029 n.13 (quoting *O'Connor*, 416 F.3d at 1223). Thus, this court recently observed that

> [g]overnments may not "mak[e] adherence to a religion relevant in any way to a person's standing in the political community." *County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 594 (1989) (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)). And actions which have the effect of communicating governmental endorsement or disapproval, "whether intentionally or unintentionally, . . . make religion relevant, in reality or public perception, to status in the political community." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).

Green, 568 F.3d at 799.

When determining whether a display has the impermissible effect "of communicating a message of governmental endorsement or disapproval" of religion, *Green*, 568 F.3d at 799, we

> look[] through the eyes of an objective observer who is aware of the *purpose,*

> *context, and history* of the symbol. The objective or reasonable observer is kin to the fictitious "reasonably prudent person" of tort law. *See Gaylor*[*v. United States*], 74 F.3d [214,] 217 [(10th Cir. 1996)]. So we presume that the court-created "objective observer" is aware of information "not limited to 'the information gleaned simply from viewing the challenged display.'" *O'Connor*, 416 F.3d at 1228 (quoting *Wells v. City & County of Denver*, 257 F.3d 1132, 1142-43 (10th Cir. 2001).

Weinbaum, 541 F.3d at 1031 (emphasis added). While the reasonable observer "is presumed to know far more than most actual members of a given community," id. at 1031 n.16, "we do not treat the reasonable observer as omniscient." *Green*, 568 F.3d at 800 (citing *Bauchman*, 132 F.3d at 560); *see also Buono v. Norton*, 371 F.3d 543, 550 (9th Cir. 2004) ("How much information we will impute to a reasonable observer is unclear.").

a. Purpose

Separate from *Lemon*'s first test, courts also consider the Government's purpose in undertaking the challenged conduct as illustrative of the effect that that conduct conveys. *See Weinbaum*, 541 F.3d at 1031, 1033 (noting that "[e]ffects are most often the manifestation of a motivating purpose"). As previously stated, in this case the UHPA's stated purpose in erecting these memorial crosses, and the State Defendants' purpose in allowing the UHPA to incorporate the UHP symbol into the memorials and

to place the crosses on public land, was secular. That fact, however, cannot be dispositive of whether the State has violated the effect prong of the *Lemon*/endorsement test, or this second prong would be rendered meaningless. Rather, the State's secular purpose is merely one element of the larger factual and historical context that we consider in order to determine whether these memorial crosses would have an impermissible effect on the reasonable observer.

b. Context and history[11]

Context can determine the permissibility of displays of religious symbols on public property. *See Allegheny County*, 492 U.S. at 598 ("Under the Court's holding in *Lynch*, the effect of a crèche display turns on its setting."); *Weinbaum*, 541 F.3d at 1035 (holding that the city of Las Cruces could use a three-cross symbol as part of its city seal because the context and history of that city "establishe[d] that the symbolism is not religious at all. Rather, it simply reflects the name of the City which, in turn, reflects a series of secular events that occurred near the site of the City."). The significance of context is perhaps best illustrated by the Supreme Court's two recent decisions involving displays of the Ten Commandments on public land. In *Van Orden v. Perry*, 545 U.S. 677 (2005), Justice Breyer, whose concurrence provided the deciding vote, concluded that the display of the Ten Commandments

[11]Here we deal with context and history together because there is no evidence of relevant historical factors apart from context information.

challenged in that case did not violate the Establishment Clause based largely on his analysis of the "context of the display," *id.* at 701 (Breyer, J. concurring), and his conclusion that "the context suggests that the State intended the display's moral message . . . to predominate," *id.* at 702 (Breyer, J., concurring). In contrast, the majority of the Court found the Decalogue display in *McCreary County v. American Civil Liberties Union*, 545 U.S. 844, 881 (2005), to be in violation of the Establishment Clause because it was placed there with a religious purpose as evidenced, in part, by the fact that it was initially displayed on its own. Thus, the context of a display can determine its legality.

This case involves memorials using a Latin cross, which "is unequivocally a symbol of the Christian faith." *Weinbaum*, 541 F.3d at 1022. In light of that, there is little doubt that Utah would violate the Establishment Clause if it allowed a private group to place a permanent unadorned twelve-foot cross on public property without any contextual or historical elements that served to secularize the message conveyed by such a display. *See American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1100-01 (11th Cir. 1983) (holding that a lighted thirty-five-foot stand-alone cross could not be displayed in a state park); *see also County of Allegheny*, 492 U.S. at 599 (using the display of a cross in a central location in a government building on Easter as the prototypical example of a display that would convey government "endorsement of Christianity"); *Buono*, 371 F.3d at 544-45 (holding that an eight-foot cross

intended as a war memorial and located on land owned by the national government violated the Establishment Clause); *cf. Trunk v. City of San Diego*, 568 F. Supp. 2d 1199, 1202 (S.D. Cal. 2008) (holding that a cross that had become a long-standing landmark of the city and was only one part of a larger war memorial could be maintained on federal land). Thus, these displays of "the preeminent symbol of Christianity," *Buono*, 371 F.3d at 545 (citation and quotation omitted), can only be allowed if their context or history avoid the conveyance of a message of governmental endorsement of religion.

Here, we conclude that the cross memorials would convey to a reasonable observer that the state of Utah is endorsing Christianity. The memorials use the preeminent symbol of Christianity, and they do so standing alone (as opposed to it being part of some sort of display involving other symbols). That cross conspicuously bears the imprimatur of a state entity, the UHP, and is found primarily on public land.[12]

The fact that the cross includes biographical information about the fallen trooper does not diminish the governmental message endorsing Christianity. This is especially true because a

[12]The record indicates that at least one, and perhaps several, of these memorials are located on private land near a state highway. That fact does not change our analysis, however, because those crosses, even though on private land, still bear the UHP insignia, which UHPA was authorized by UHP to use.

motorist driving by one of the memorial crosses at 55-plus miles per hour may not notice, and certainly would not focus on, the biographical information. The motorist, however, is bound to notice the preeminent symbol of Christianity and the UHP insignia, linking the State to that religious sign.

Moreover, the fact that all of the fallen UHP troopers are memorialized with a Christian symbol conveys the message that there is some connection between the UHP and Christianity. This may lead the reasonable observer to fear that Christians are likely to receive preferential treatment from the UHP—both in their hiring practices and, more generally, in the treatment that people may expect to receive on Utah's highways.[13] The reasonable observer's fear of unequal treatment would likely be compounded by the fact that these memorials carry the same symbol that appears on UHP patrol vehicles. *See Friedman v. Bd. Of County Comm'rs of Bernalillo County*, 781 F.2d 777, 778, 782 (10th Cir. 1985) (holding that a city's seal "bearing, among other things, a latin cross and the Spanish motto, 'CON ESTA VENCEMOS' ['With This We Conquer']," violated the Establishment Clause in part because "[a] person approached by officers leaving a patrol car emblazoned with this seal could reasonably assume that the officers were Christian

[13]The connection between the UHP and Christianity is perhaps even more strongly conveyed by the two memorial crosses located immediately outside the UHP office. We are deeply concerned about the message these crosses would convey to a non-Christian walking by the UHP office or, even more troubling, to a non-Christian walking in against his will.

police. . . . A follower of any non-Christian religion might well question the officers' ability to provide even-handed treatment. A citizen with no strong religious conviction might conclude that secular benefit could be obtained by becoming a Christian."). And the significant size of the cross would only heighten this concern.

Defendants point to four contextualizing facts that, they argue, render these cross memorials sufficiently secular to pass constitutional muster: (1) these displays are clearly intended as memorials; (2) they are located in areas where similar memorials have long been displayed; (3) many of the designers and producers of these displays do not revere the cross as a symbol of their faith; and (4) a majority of Utahns do not revere the cross as a symbol of their faith. Although we agree that some of these contextual elements may help reduce the message of religious endorsement conveyed by these displays, we think that these displays nonetheless have the impermissible effect of conveying to the reasonable observer that the State prefers or otherwise endorses Christianity.

i. These Displays are Clearly Intended as Memorials

Defendants argue that the placement of these displays, in combination with the troopers' names emblazoned on the crosses and the biographical information included in these displays, clearly conveys the message, instead, that these crosses are designed as memorials and, therefore, that they do

not convey a message of religious endorsement. We agree that a reasonable observer would recognize these memorial crosses as symbols of death. However, we do not agree that this nullifies their religious sectarian content because a memorial cross is not a *generic* symbol of death; it is a *Christian* symbol of death that signifies or memorializes the death of a *Christian*. The parties agree that a cross was traditionally a Christian symbol of death and, despite Defendants' assertions to the contrary, there is no evidence in the record that the cross has been widely embraced as a marker for the burial sites of non-Christians or as a memorial for a non-Christian's death. The UHPA acknowledges that when it asserts that it would honor the request made by a Jewish state trooper's family to memorialize him with a Star of David rather than a cross.

The State Defendants point to the use of crosses as markers for fallen soldiers as evidence that the cross has become a secular symbol of death. However, the evidence in the record shows that the military provides soldiers and their families with a number of different religious symbols that they may use on government-issued headstones or markers. Even in the American military cemeteries overseas, which include rows and rows of white crosses, fallen Jewish service members are memorialized instead with a Star of David. Thus, while the cross may be a common symbol used in markers and memorials, there is no evidence that it is widely accepted as a secular symbol.

Defendants and some of the amici urge this court to treat memorial crosses in much the same way as the Supreme Court has treated Christmas trees and historical displays that include depictions of the Ten Commandments. These arguments are unpersuasive. Courts have consistently treated Christmas as both a religious and secular holiday, and many courts have cited Justice Blackmun's statement that "[a]lthough Christmas trees once carried religious connotations, today they typify the secular celebration of Christmas." *County of Allegheny*, 492 U.S. at 616 (Blackmun, J., concurring); *see, e.g., Adland v. Russ*, 307 F.3d 471, 485 (6th Cir. 2002); *American Civil Liberties Union v. Schundler*, 104 F.3d 1435, 1442 (3rd Cir. 1997). Unlike Christmas, which has been widely embraced as a secular holiday, however, there is no evidence in this case that the cross has been widely embraced by non-Christians as a secular symbol of death. We cannot, therefore, conclude that the cross—which has a long history as a predominantly religious symbol—conveys in this context a secular meaning that can be divorced from its religious significance. *Compare Weinbaum*, 541 F.3d at 1034 (concluding that the city of Las Cruces's use of a three-cross symbol did not violate the Establishment Clause at least in part because "symbols containing multiple crosses identify many secular businesses with the Las Cruces community"), with *Koenik v. Felton*, 190 F.3d 259, 266 n.7 (4th Cir. 1999) (rejecting the argument that Easter, like Christmas, had been embraced as a secular holiday because the "record [wa]s devoid" of evidence that there was a significant "number of persons for whom the holiday has no

religious significance but who nonetheless celebrate the occasion in some manner").

Similarly, the memorial crosses at issue here cannot be meaningfully compared to the Ten Commandments display that the Supreme Court upheld in *Van Orden*. The display at issue in *Van Orden* was part of a historical presentation of various legal and cultural texts and, in that context, the "nonreligious aspects of the tablets' message [] predominate[d]" over any religious purpose or effect. 545 U.S. at 701 (Breyer, J., concurring). In this case, on the other hand, the crosses stand alone, adorned with the state highway patrol insignia and some information about the trooper who died there.

ii. Roadside Memorials Often Use the Symbol of the Cross and, in that Context, Crosses are not Seen as Religious Symbols

Defendants argue that crosses are a fairly common symbol used in roadside memorials and, in that context, they are seen as secular symbols. However, the mere fact that the cross is a *common* symbol used in roadside memorials does not mean it is a *secular* symbol. There is no evidence that non-Christians have embraced the use of crosses as roadside memorials. Further, there is no evidence that any state has allowed memorial crosses to be erected on public property that, like the memorials at issue in this case, display the official insignia of a state entity. Finally, even if we might consider a roadside cross generally to be a secular symbol of

death, the memorial crosses at issue in this case appear to be much larger than the crosses typically found on the side of public roads. Defendants provided a statement from a representative of the Montana American Legion White Cross Highway Fatality Marker Program in support of their claim that roadside crosses are common, recognizable symbols of highway fatalities. The cross memorials at issue here are ten times as large as those crosses, which are only between twelve and sixteen inches in height. The massive size of the crosses displayed on Utah's rights-of-way and public property unmistakably conveys a message of endorsement, proselytization, and aggrandizement of religion that is far different from the more humble spirit of small roadside crosses.[14]

iii. The Designers and Producers of These Displays do not Revere the Cross as a Symbol of their Faith

Nor are we persuaded of the significance of the fact that many of the designers and producers of these displays do not revere the cross as a symbol of their faith. As the Supreme Court recently

[14]In fact, the massive size of these displays is such a deviation from the normal memorials of death seen on the sides of roads that they may convey to the reasonable observer a Christian religious symbol. Defendants assert the crosses must be as large as they are so motorists passing by at 55-plus miles per hour can see them. But the size far exceeds the size necessary to be seen from the highway. And, not all of the memorials are located near a highway. For example, several are located near a UHP office. The size of those crosses is particularly troubling.

explained, "[b]y accepting a privately donated monument and placing it on [state] property, a [state] engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument's donor or creator." *Pleasant Grove City*, 129 S. Ct. at 1136. Thus, the designers' purpose in creating the displays at issue in this case may not always coincide with the displays' likely effect on the reasonable observer. We conclude that is the case here.

iv. Christians who Revere the Cross are a Minority in Utah

Similarly, the fact that cross-revering Christians are a minority in Utah does not mean that it is implausible that the State's actions would be interpreted by the reasonable observer as endorsing that religion. In *County of Allegheny*, the Supreme Court held that Pittsburgh did not violate the Establishment Clause by placing a Channukah menorah on its property. However, in a vote-counting exercise, Justice Blackmun explained, in a portion of the opinion which no other Justice joined, that his conclusion that this "display cannot be interpreted as endorsing Judaism alone does not mean, however, that it is implausible, as a general matter, for a city like Pittsburgh to endorse a minority faith." 492 U.S. at 616 n.64 (Blackmun, J., concurring). Similarly, in her concurrence, Justice O'Connor noted that

> [r]egardless of the plausibility of a putative governmental purpose, the more important inquiry here is whether the governmental display of a minority faith's religious symbol could ever reasonably be understood to convey a message of endorsement of that faith. A menorah standing alone at city hall may well send such a message to nonadherents, just as in this case the crèche standing alone at the Allegheny County Courthouse sends a message of governmental endorsement of Christianity . . . .

Id. at 634 (O'Connor, J., concurring). Three other Justices found that, in fact, the menorah/Christmas tree display violated the constitution, concluding that the city's display of Christmas and Hanukkah symbols was "the very kind of double establishment that the First Amendment was designed to outlaw." *Id.* at 655 (Stevens, J., concurring in part and dissenting in part). Thus, a majority of the Justices in *County of Allegheny* determined that a city could violate the Establishment Clause by publicly displaying the symbol of a religion whose members constituted a mere 12% of that city's population. S*ee id.* at 616 n.64 (noting that Jews constituted 45,000 of Pittsburgh's population of 387,000, or approximately 12% of the population) (Blackmun, J., concurring). In this case, the parties agree that cross-revering Christians comprise approximately 18% of the population in Utah, which is greater than the percentage of Jews in Pittsburgh at the time of the Court's decision in *County of Allegheny*. Thus, the fact that most Utahns do not revere the cross as

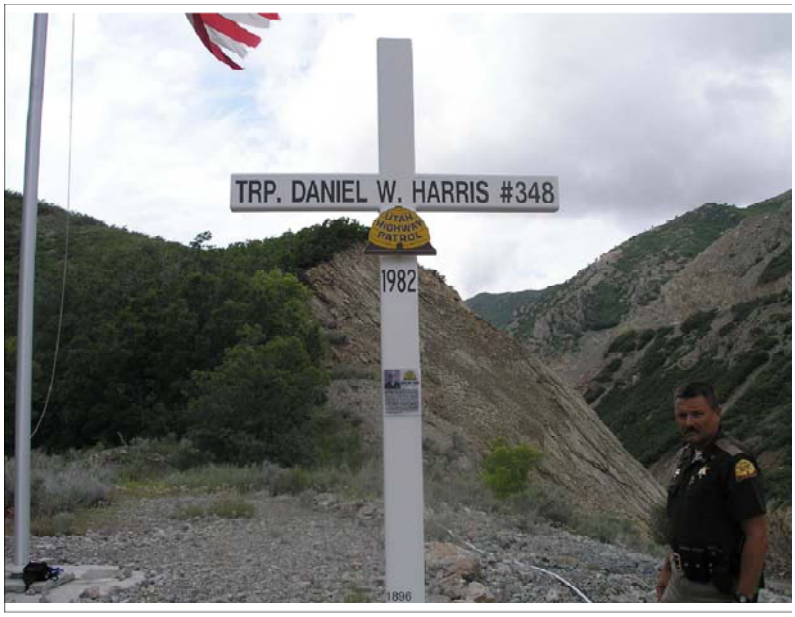
a symbol of their faith does not mean that the State cannot violate the Establishment Clause by conduct that has the effect of promoting the cross and, thereby, the religious groups that revere it.

This appears to be especially true in this case because members of the majority LDS Church "may not necessarily share the same sensitivity to the symbol [of the cross] as a Jewish family." *American Atheists*, 528 F. Supp. 2d at 1256 n.6. Although the evidence indicates that LDS Church members do not use the cross as a symbol of their religion, they do "remember with reverence the suffering of the Savior." (Aplt. App. at 2241.) And, in any event, there are many cross-revering Christians and many non-Christians for whom the Roman cross has an unmistakable Christian meaning.

These factors that Defendants point to as secularizing the memorials do not sufficiently diminish the crosses's message of government's endorsement of Christianity that would be conveyed to a reasonable observer. Therefore, the memorials violate the Establishment Clause.

IV. Conclusion

Accordingly, we REVERSE the district court's decision granting summary judgment for Defendants, and REMAND the case to the district court to enter judgment for Plaintiffs consistent with this opinion.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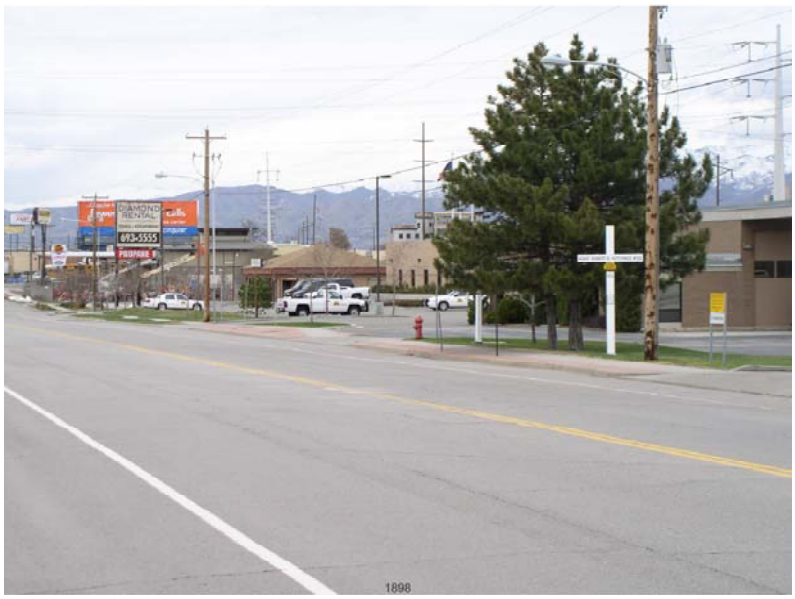
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Filed November 20, 2007

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

* *

AMERICAN ATHEISTS, INC., a Texas non-profit corporation; R. ANDREWS, S. CLARK and M. RIVERS, Plaintiffs, vs. COLONEL SCOTT T. DUNCAN, Superintendent, Utah Highway Patrol; JOHN NJORD, Executive Director, Utah Department of Transportation; D'ARCY PIGNANELLI, Executive Director, Department of Administrative Services; and F. KEITH STEPAN, Director Division of Facilities Construction and Management Department of Administrative Services, Defendants UTAH HIGHWAY PATROL ASSOCIATION, Intervener-Defendant.	Case No. 2:05CV00994 DS MEMORANDUM DECISION

* *

This matter is before the court to address the following pending motions: Plaintiffs' Motion for Partial Summary Judgement Re: Christian Cross as Religious Symbol (# 27); Intervenor-Defendant UHPA's Motion for Summary Judgment and Request for Hearing (# 176); Plaintiffs' Motion for Partial Summary Judgment Re: Standing, Etc (# 110); Plain-tiffs' Motion for Summary Judgment (incorporating Plaintiffs' Pending Motion for Partial Summary Judgment as to Message of a Christian Cross, Plaintiffs' Pending Motion re: Affirmative Defenses, Intervener's Pending Motion for Summary Judgment) (# 163); State Defendants' Motion for Summary Judgment (Establishment of Religion) (# 165). Plaintiffs, the State Defendants, and Intervener-defendant Utah Highway Patrol Association appeared before the court for oral argument on November 13, 2007.

Statement of Undisputed Material Facts

1. The Utah Highway Patrol Association ("UHPA"), is a private, non-profit Utah corporation that supports the Utah Highway Patrol ("UHP") officers and their families.

2. The UHPA is not a religious organization.

3. The UHPA supports and represents the interests of fallen troopers and their families.

4. The idea for the UHPA Fallen Trooper Memorial program began after twenty-seven year old

Trooper William J. Antoniewicz was ambushed and killed near the Utah-Wyoming border.

5. UHPA President Lee Perry helped conceive of the memorial program after he learned that there was nothing to memorialize the spot where Trooper Antoniewicz had fallen.

6. Families of other fallen troopers contacted the UHPA requesting that similar memorials be erected for their lost loved ones as well.

7. The UHPA obtained the consent of at least one family member for each memorial erected.

8. No family member has ever requested any symbol other than the cross as the basis of the memorial. Because the UHPA exists to serve family members of highway patrolmen, the UHPA would provide another memorial symbol if requested by the family.

9. Memorials to fallen troopers were originally placed on private property, with the owner's consent, at or near where the trooper died. After a while, the UHPA obtained permission from the State of Utah, including the Utah Department of Transportation, to erect roadside memorials on state property to honor state troopers who died in the line of duty.

10. Permission was granted by Utah Department of Transportation to erect the memorials in rest areas, view areas, etc., and UDOT has

established a procedure for UHPA to secure permission to erect its memorial crosses.

11. UHPA sought and received permission from the State of Utah, Division of Facilities. Construction & Management to erect the two (2) existing memorial crosses at the Utah Highway Patrol offices, 5770 South 320 West, Murray, Utah, as well as additional crosses as the need arises.

12. The UHPA decided to honor thirteen troopers by placing memorials at or near the location where the trooper died or was mortally injured while serving in the line of duty.

13. The UHPA chose the locations where the memorials are placed because they were (1) visible to the public; (2) safe to stop and view; and (3) as close to the actual spot of the trooper's death as possible.

14. At each location, the UHPA erected a twelve-foot white metal cross, bearing a plaque with the picture of the trooper and his or her biography.

15. The memorials also bear the Utah Highway Patrol logo and the trooper's name, rank, and badge number and the year the trooper died in large black font.

16. The UHPA was authorized to use the UHP logo on the memorials to fallen peace officers because

the officers were Utah State Highway Patrol Troopers.

17. The UHPA did not use any state funds to finance its memorial efforts; rather the UHPA created, designed, funded, erected, and maintains the memorials.

18. The Utah Department of Transportation ("UDOT") took no part in designing or selecting the memorial cross.

19. The stated purpose of the UHPA memorial is: a. To memorialize troopers who died in the line of service; b. Remind the traveling public of the service and sacrifice of the troopers on the highways and elsewhere in Utah; c. Remind the traveling public to drive safely and vigilantly.

20. A highly motivating factor in the selection of the memorial cross was UHPA's belief that only a cross could effectively convey the simultaneous messages of death, honor, remembrance, gratitude, sacrifice, and safety.

21. The UHPA also chose the white cross because it is commonly used as a memorial symbol in cemeteries, particularly government owned/sponsored military cemeteries in this country and elsewhere in the world.

22. The UHPA chose the white cross because such crosses are a time-honored medium for memorializing soldiers, and the fallen troopers it

represents are entitled to the same high honor because each of them died in the line of duty for their fellow citizens.

23. The UHPA chose a memorial symbol which combined a white, 12 foot high steel cross, large black lettering, and the conspicuous beehive logo to conspicuously and immediately convey the death of a Utah Trooper to observers that drive by the memorials.

24. The official Utah Highway Patrol beehive logo placed on the memorial cross is approximately sixteen inches wide and twelve inches high and hangs just below the place where the arms of the cross intersect.

25. The UHPA did not intend to convey a religious message when it selected the cross as a memorial symbol.

26. White crosses are used to remind motorists of the dangers of the road.

27. The corporate plaintiff American Atheists, Inc. is a non-profit Texas corporation.

28. Individually named plaintiffs are members of American Atheists, Inc. and are adult citizens and residents of the State of Utah.

29. American Atheists, Inc. is established for the purpose of advocating, laboring for, promoting ...

the Jeffersonian concept of complete and absolute separation of church and state.

30. The cross has historically been associated with Christianity and used by many Christian churches as a religious symbol.

31. Crosses are found prominently on the steeples and the spires of buildings, churches, and cathedrals of many Christian faiths in and outside of Utah. Christian crosses are displayed on the fronts of church buildings, in the worship areas of Catholic and Episcopal churches and on the vestments of clerics and jewelry worn by members of various Christian faiths.

32. A majority of Utahns, approximately fifty-seven percent, are members of the Church of Jesus Christ of Latter-day Saints.

33. Neither the Church of Jesus Christ of Latter-day Saints nor its members use the cross as a symbol of their religion or in their religious practices.

34. There are no other displays near the memorial crosses.

35. The memorial crosses are intended to be seen by motorists using the adjacent roads of the State of Utah.

36. The individual plaintiffs have experienced direct and unwelcome contact with the memorial crosses.

37. The individual plaintiffs are unable to avoid encountering the memorial crosses because of their use of State owned and maintained roads, highways, facilities, rest areas, etc. where the memorial crosses are located.

38. The visual impact of seeing the UHP logo on the memorial crosses offends, intimidates, and affects individual plaintiffs.

39. The Establishment Clause claims in this lawsuit are based on: (1) the presence of most of the memorial crosses on government property and (2) the presence of the official UHP logo on all the memorial crosses.

I. BRIEF BACKGROUND

The Utah Highway Patrol Association ("UHPA"), a private, non-profit Utah corporation that supports the Utah Highway Patrol ("UHP") officers and their families, obtained permission from the State of Utah to erect roadside memorials to honor state troopers who died in the line of duty. The UHPA decided to honor thirteen troopers by placing memorials near the location where the trooper died or was mortally injured. The UHPA placed some of these memorials on private property and placed other memorials on government-owned land adjacent to state highways.

At each location, the UHPA erected a twelve-foot white metal cross, bearing a plaque with the picture of the trooper and his or her biography. The memorials also bear the Utah Highway Patrol logo

and the trooper's name, rank, and badge number. The UHPA did not use any state funds to finance its memorial efforts. The UHPA created, designed, funded, erected, and maintains the memorials. Additionally, local businesses contributed labor, materials, and other resources to assist the UHPA.

American Atheists, Inc. ("Plaintiffs") brought suit under 42 U.S.C. § 1983 against several Utah state officials ("State Defendants"), alleging that the State Defendants violated the Establishment Clause, the Free Expression Clause, and Article I of the Utah Constitution by permitting the UHPA to erect the memorial crosses.[1] UHPA sought to intervene to protect its interests as creator and maintainer of the memorials and the court granted the motion to intervene (hereafter, both defendants are collectively referred to as "Defendants" as the text requires). Plaintiffs filed a motion for partial summary judgment, asking this court to declare that "the stand alone Christian crosses that are the subject matter of this action are, as a matter of law,

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[1] The Free Expression claim has since been withdrawn by plaintiffs and will not be addressed in this Memorandum Decision. The court recognizes Plaintiffs' claims that Defendants' actions violate the Establishment Clause of the Utah Constitution, Art. I, § 4 (". . .No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment.") as well as the Federal Constitution. Plaintiffs argue the state constitutional provision is stronger and clearer than its federal counterpart. For the sake of simplicity, we will simply refer to the remaining alleged violations as violations of the First Amendment and not as alleged violations of the First Amendment and the Utah Constitution's relevant provisions. Where relevant, the court will reference important differences.

exclusively religious symbols." Plaintiffs' Motion for Partial Summary Judgment Re: Christian Cross as Religious Symbol at 2 (Docket # 27). The UHPA then filed a motion for summary judgment as an intervener-defendant and requested the Court dismiss all of Plaintiffs' claims and schedule a hearing. The parties thereafter took a year to do discovery and these motions were put on hold. At the end of July 2007, new summary judgment motions were filed (as listed above) and all are now ripe for determination by the court. While some of the motions are new, the issues remain the same as those addressed in the parties' first motions for summary judgment-whether the State Defendants violated the Establishment Clause by allowing UHPA to erect memorial crosses bearing the UHP logo on state-owned property.

II. Standing (Plaintiffs' Motion for Partial Summary Judgment # 110)

The court addressed the issue of standing at the beginning of the hearing and ruled that Plaintiffs have made sufficient allegations to challenge the constitutionality of the State Defendants' action. Individuals have standing to make a First Amendment challenge when they allege sufficient facts to show that they were "frequently brought into direct and unwelcome contact" with a monument on public land. *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1223 (10th Cir. 2005). In *O'Connor*, the Tenth Circuit Court of Appeals held that a university faculty member and a student had standing to challenge the display of a sculpture that was

allegedly hostile to the Roman Catholic religion. *Id.* The court reasoned that the faculty member and student had standing because they would have to alter their routes across campus in order to avoid the sculpture. Thus, their "allegations that they were frequently brought into direct and unwelcome contact with the statue [were] sufficient to give them standing" to challenge the constitutionality of the monument. *Id.*

Like the faculty member and the student in *O'Connor* who frequently came in direct and unwelcome contact with a monument, Plaintiffs have experienced direct and unwelcome contact with the memorial crosses at issue in this case. And just as the plaintiffs in *O'Connor* had to alter their routes across campus in order to avoid the sculpture, Plaintiffs would have to alter their commutes in order avoid contact with the memorials because the UHPA displayed the crosses in prominent locations on the side of highways. Consequently, like the faculty member and the student, Plaintiffs' allegations are sufficient to give them standing to challenge the constitutionality of the memorial crosses.

III. Establishment Clause

A. Overview of Establishment Clause Jurisprudence

Plaintiffs claim that Defendants' actions violated the Establishment Clause. Accordingly, this court must select a standard by which to judge whether a

violation occurred. Finding appropriate standards of judgment in First Amendment case law, however, provides courts with an intriguing challenge. The Supreme Court of the United States resists confining itself to a single Establishment Clause test since such sensitive analysis is inconsistent with "any single test or criterion." *Lynch v. Donnelly*, 465 U.S. 668, 669 (1984). Fortunately, the Tenth Circuit Court of Appeals has provided a workable framework for Establishment Clause questions. *O'Connor*, 416 F.3d at 1223-24; *Bauchman v. West High School*, 132 F.3d 542, 551-52 (10th Cir.1997).

The Tenth Circuit Court of Appeals presented its First Amendment framework after careful analysis of pertinent Supreme Court case law. The Supreme Court presented its benchmark Establishment Clause test in *Lemon v. Kurtzman*. 403 U.S. 602 (1971). In *Lemon*, the Court held that government action does not violate the Establishment Clause so long as it (1) has a secular purpose; (2) does not have the principal or primary effect of advancing or inhibiting religion; and (3) does not foster an excessive entanglement of church and state. *Lemon*, 403 U.S. at 612-13.

In the 1980s, however, members of the Court attacked the *Lemon* test. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 655 (Kennedy, J., concurring in part and dissenting in part); *Aguilar v. Felton*, 473 U.S. 402, 419 (1985) (Burger, C.J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 89 (1985) (Burger, C.J., dissenting); *Mueller v. Allen*, 463 U.S. 388, 394 (1983). The Court eventually refined the

Lemon test, and, under the revised version, the government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message that "religion or a particular religious belief is favored or preferred." *Allegheny*, 492 U.S. at 592-93 (quoting *Jaffree*, 472 U.S. at 70 (O'Connor, J., concurring in judgment)). Later case law indicated that the purpose component evaluates whether the government's "actual" purpose is to endorse or disapprove of religion. *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987); *Jaffree*, 472 U.S. at 56. The effect component evaluates whether a "reasonable observer," aware of the history and context of the community in which the conduct occurred, would view the practice as communicating a message of government endorsement or disapproval. *Capitol Square v. Pinette*, 515 U.S. 753 (1995) (O'Connor, J. concurring).

Though the revised *Lemon* test is "widely accepted as the controlling analytical framework for evaluating Establishment Clause claims," it has been criticized heavily by many, and not all members of the Court have adopted the test. *Bauchman*, 132 F.3d at 552. Even those who have implemented the revised test disagree on how to apply it. *Id.* For example, Justice Scalia stated that the Court should eliminate the purpose component of the test, declaring that discerning the government's subjective intent is an impossible task. *Edwards*, 482 U.S. at 639. (Scalia, J., dissenting).

The recent Ten Commandments cases, *Van Orden v. Perry*, 545 U.S. 677 (2005), *and McCreary*

County v. ACLU, 545 U.S. 844 (2005), add little clarification. *Van Orden* was a plurality decision in which none of the concurring judges used the *Lemon* test and the dissenting judges used only portions. The *McCreary* decision cited the *Lemon* test, but only applied the purpose prong, with an emphasis on a "neutrality" analysis.

Noting the wide range of opinions regarding the Endorsement tests even before the *Van Orden*/ *McCreary* decisions, the Tenth Circuit stated:

> [T]he uncertainty surrounding the [Supreme] Court's position regarding the appropriate scope of the endorsement test and the appropriate Establishment Clause analysis, in general, cautions us to apply both the purpose and effect components of the refined endorsement test, together with the entanglement criterion imposed by Lemon.

Bauchman, 132 F.3d at 552.

With that overview of Establishment Clause jurisprudence in mind, this court will follow the Tenth Circuit's guidance and use the following standard to decide the outcome of this case: Has either (1) the purpose or (2) the effect of the State Defendants' conduct conveyed a message that religion or a particular religious belief is favored or preferred, or (3) does the State Defendants' conduct qualify as excessive entanglement?

B. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT (# 27)

Courts render summary judgment when a party can "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). Plaintiffs have asked the court to declare that "the stand alone Christian crosses that are the subject matter of this action are, as a matter of law, exclusively religious symbols." The court finds Plaintiffs are not entitled to judgment as a matter of law because the memorial crosses at issue communicate a secular message, a message that a patrolman died or was mortally wounded at a particular location.

In order to determine whether a monument endorses religion, courts examine the context in which the monument is displayed. *See Van Orden v. Perry*, 545 U.S. 677, 691 (2005) (Rehnquist, C.J., plurality opinion) (pointing out the differing contexts of schoolrooms on the one hand, and legislative chambers and capitol grounds on the other). In *Van Orden*, the Supreme Court held that a display of the Ten Commandments at a state capitol did not violate the Establishment Clause. The Court recognized that even classic religious symbols may have various meanings and purposes depending on their context. *Id.* at 690-91. The Court noted that the Ten Commandments were no exception and stated that "[i]n certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message but also a secular moral message (about proper standards of social conduct)." *Id.* at 701 (Breyer, J., concurring in the judgment).

In contrast with the Supreme Court's approach, Plaintiffs request that this Court simply declare the UHPA's Latin crosses to be "exclusively religious" symbols without taking the context in which the UHPA displayed those crosses into account. Plaintiffs cite a number of cases in which courts declared that publicly-displayed Latin crosses violated the Establishment Clause. Plaintiffs fail to state, however, that the courts in those cases examined the purpose and the context or use of the crosses before determining what the crosses communicated. *See, e.g., ACLU v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986) (stating, "The display of the cross, at least in the circumstances revealed by the record of this case, is sectarian."); *Gonzales v. N. Township*, 4 F.3d 1412, 1423 (7th Cir. 1993) (stating, "The crucifix in Wicker Park does not bear secular trappings sufficient to neutralize its religious message.").

This court recognizes that the Latin cross, like the Ten Commandments, may act as a secular as well as a religious symbol. Next, just as the Supreme Court examined the context in which the Ten Commandments were displayed before determining the message they communicated and just as other courts have examined the purpose and context of monuments to identify their significance, this court examines the purpose and context in which the UHPA displayed its memorial crosses to determine whether they communicate a secular or a religious message. Upon making that inquiry, the court finds that the memorial crosses at issue communicate a secular message, a message that a UHP trooper died

or was mortally wounded at a particular location. Each cross communicates that message by featuring the UHP logo, the name and badge number of the trooper, and a plaque that provides passers-by with a biography of the fallen trooper. Thus, this court denies Plaintiffs' motion to declare the crosses at issue function as exclusively religious symbols and finds Plaintiffs are not entitled to judgment as a matter of law.[2]

C. Remaining Motions for Summary Judgment Addressing Whether Memorial Crosses Violate the Establishment Clause (#163, #165, #176)

1. Purpose of the Government's Conduct

The court finds the government's conduct did not have the purpose of conveying a message that "religion or a particular religious belief is favored or preferred." *Allegheny*, 492 U.S. at 592-93 (quoting *Jaffree*, 472 U.S. at 70 (O'Connor, J., concurring in judgment)).[3] In order to succeed on this claim,

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[2] Intervenor defendant UHPA also contends that Plaintiffs improperly filed the motion for partial summary judgment because they sought to establish a material fact without having asked for summary judgment on any of their claims. *See* Fed. R. Civ. P. 56(a),(c),(d). This argument is valid, but the court chooses to proceed on the merits and address the question presented in all the pending motions on whether the memorial crosses violate the Establishment Clause.

[3] The focus of this prong is the govern-ment's purpose, not the purposes of any private group (like UHPA). *Summum v. City of Ogden*, 297 F.3d 995, 1010 (10th Cir. 2002). Courts

Plaintiffs would need to demonstrate that Defendants' actual purpose was to endorse or disapprove of religion or a particular religious belief. *See Bauchman*, 132 F.3d at 554. The Supreme Court noted that a court's inquiry on that question "should be deferential and limited." *Jaffree*, 472 U.S. at 74; *McCreary*, 545 U.S. at 900-02 (Scalia, J., dissenting). *But see McCreary*, 545 U.S. at 859-66. In addition, the inquiry should "resist attributing unconstitutional motives to the government, particularly where we can discern a plausible secular purpose." *Bauchman*, 132 F.3d at 554. *See also Mueller v. Allen*, 463 U.S. 388, 394 (1983); *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1259 (10th Cir. 2005).

The government actions in question here are the State Defendants' granting permission for the state's UHP logo to appear on cross-shaped memorials and allowing, in some cases, those cross-shaped memorials to be placed on state land adjacent to roadways and adjacent to the UHP headquarters. Plaintiffs have failed to demonstrate that the State Defendants, by granting UHPA permission to erect memorials bearing the UHP logo on public land, intended to convey a message that religion or a particular religious belief is favored or preferred. On the contrary, the undisputed material facts allow the court to discern a plausible secular purpose in this case, that of honoring UHP troopers who died during

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have, however, used private groups' stated purposes to inform their inquiry into the government's purposes. *See, e.g., Van Orden v. Perry*, 545 U.S. 677, 701 (2005) (Breyer, J., concurring in judgment).

their term of service. Lee Perry, the quartermaster of the UHPA and one of two individuals involved in the conception of the memorial project, described what the roadside crosses are intended to accomplish:

> I wanted a symbol that would convey the following simultaneously: (1) a trooper died while serving near this spot; (2) that trooper will always be honored and remembered for his sacrifice; (3) the people of Utah are indebted and grateful to that trooper's family for their sacrifice; and (4) that safety is a paramount concern to the people of Utah. Because most people would be passing the memorial at fifty-five miles per hour or greater, the symbol needed to prominently communicate all this instantaneously.

Declaration of Lee Perry in Support of Intervener Defendant UHPA's Motion for Summary Judgment at 2.

Judicially noticed facts also support accepting the secular purposes advanced by Defendants. *See* Request for Judicial Notice, (# 247). Significantly, unlike the rest of the United States, only a quarter- or less-of Utah's population belong to a religion that uses the cross for religious purposes.[4] It would be unprecedented judicial divination for this court to nevertheless discern that the UHPA directors or the

[4] 57% of Utah residents belongs to the LDS church, a Christian sect which does not use the cross in its religious iconography. Request for Judicial Notice (# 247).

state officials were intending to promote those minority religions through the use of the cross design. Neither does the court discern an intent to promote the majority religion in Utah which, while still a Christian sect, does not use the cross-either as a religious symbol, or in its worship practices. *Id.*, Facts 1-5. Plaintiffs are therefore unconvincing in their assertion that the use of the cross design was to promote religion in general, or any specific religion when neither those involved in the memorial creation nor a majority of the citizens in the state affected use the symbol in their religious practices.[5]

As demonstrated by the motion for partial summary judgment asking the court to declare the Latin cross an exclusive religious symbol, Plaintiffs would have the court find the cross' religious symbolism overpowering. Specifically, they would have the court hold that the cross can only carry religious symbolism, and so any governmental use of it (outside of an educational setting) must therefore be for the purpose of endorsing a particular religion, Christianity. It is true that the cross is readily identifiable as a symbol used by Christianity.

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[5] This religious dynamic distinguishes this case from all preceeding cross cases. In those cases, the majority were Christians that used the cross and those claiming First Amendment protection from that popular use were the minority. And, as stated in *Friedman v. Board of County Commissioners*, "[t]he comfort of the majority is not the main concern of the Bill of Rights." 781 F.2d 777, 782 (10th Cir. 1985) (reh'g en banc). Here such concerns are utterly irrelevant. It is a minority that uses the cross religiously, and a group presumably representing a different minority claiming First Amendment protection.

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 770-71 (1995) (Thomas, J., concurring) (discussing cross as a religious symbol and as a political symbol). *See also*, Request for Judicial Notice,¶ 6. But it is quite a leap from there to declare that any display of the Latin cross reveals a religious purpose underlying its use. *See Capitol Square*, 515 U.S. at 770-71 (Thomas, J., concurring). Courts should be reticent to engage in proscribing the metes and bounds of how and to what extent certain symbols may permissibly be used.

One area where the Court has sanctioned governmental regulation of symbols is intellectual property law. The regulation of trademarks has been justified on economic policy grounds. The law has recognized trademark owners' economic interest in preserving the strength of their marks as validly competing with the interests in freedom of speech and the freedom of expression. In that sphere, the law generally gives the trademark owners' interests precedence. But outside that sphere, freedom of expression generally rules. Outside of IP law, the rule seems to be that stated by the Court in the *Texas v. Johnson* flag burning case: "To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernable or defensible boundaries." 491 U.S. 397, 417 (1989). In that case, the Court chastised the government for trying to limit the expressive uses of the flag, and through that attempting to prescribe artificial bounds for the flag's symbolic use.

Acknowledging this Supreme Court counsel, and recognizing the inapplicability of Intellectual Property policy to the arguments presented by Plaintiffs, both free expression and "fair use" demand that the court not limit what messages the cross may send. Rather, the court is persuaded by Defendants that the symbol at issue in this case is capable of broader use than Plaintiffs have represented, and thus the court recognizes the validity of UHPA's secular reasons for choosing the cross design.[6]

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[6] Plaintiffs aver that Defendants' willingness to consider allowing a symbol other than a cross upon request from a Jewish trooper's family demonstrates conclusively that the cross is a religious symbol used to identify the deceased as Christian. Plaintiffs fail to realize that symbols are capable of *simultaneously* carrying multiple meanings. The court sees no anomaly in a Jewish person that understands that the government's purpose here is not to endorse religion, but is still sensitive enough to desire a memorial other than a cross. As noted, families of memorialized LDS troopers, who likewise do not use the cross as a religious symbol, have already recognized the government's secular purpose (though the court recognizes that a member of the LDS faith may not necessarily share the same sensitivity to the symbol as a Jewish family). Further than this, the court declines to comment on this particular hypothetical. It is undisputed that no one has asked for a different symbol to be used. Whether the UHPA deigns to grant such a request should the circumstance arise is of no moment here. The facts compel finding that the purposes of the memorial do not include identifying the religion of the deceased; if the UHPA at some future date makes a decision in consideration of a Jewish family's sensitivities, the secular purposes of the memorial as defined today are not compromised.

Finally, there is no evidence suggesting the Defendants' reasons for choosing the memorial design are a sham, and with reasonable secular purposes to look to instead, the court can give deference to those secular reasons. Accordingly, the court finds UHPA's reasons for choosing the cross design are convincingly secular.

The court reaches the same conclusion regarding the purposes for using the UHP logo on the memorials and erecting the memorials on state land. The court can discern the secular purposes of identifying the trooper as affiliated with UHP and marking the spot where the trooper died or was fatally injured. Further, the stated purposes of wanting the traveling public to see the memorials and be reminded of safety concerns and the sacrifices made on their behalf are convincing and uncontroverted and have been adopted by the State Defendants. None of these purposes, nor any other in evidence, belie an intent to "endorse or disapprove" of any sect, or even religion in general. There is no evidence that any of Defendants' purposes were merely a sham or that they actually harbored other unconstitutional motives to promote religion. The secular reasons for design and placement of the memorials in evidence before the court are therefore sufficient to pass the secular purpose prong of the Lemon Test.

2. Effect of the Government's Conduct

The second prong of Establishment Clause analysis requires the court to determine whether the

State Defendants' conduct has the effect of conveying a message that "religion or a particular religious belief is favored or preferred." *Allegheny*, 492 U.S. at 592-93 (quoting *Jaffree*, 472 U.S. at 70 (O'Connor, concurring in judgment)). In order to succeed on this claim, Plaintiffs need to show that a "reasonable observer," aware of the history and context of the community in which the conduct occurs, would view the practice as communicating a message of government endorsement or disapproval. *Capitol Square*, 515 U.S. at 777 (O'Connor, J., concurring). It is important to note that "on occasion some advancement of religion will result from governmental action," however, actions that confer incidental benefits upon religion can remain constitutionally valid. *Lynch*, 465 U.S. at 683. Furthermore, because this is an objective inquiry, the court need not ask whether a particular individual or group might be offended by the government's actions. *See Bauchman*, 132 F.3d at 555. Like in obscenity law, the question is not posed to the most sensitive in society. *See Miller v. California*, 413 U.S. 15, 33 (1973). Rather, the question is an objective one and the touchstone is whether the government would be seen as acting neutrally, both as between religions, and also as between religion and non-religion generally.

The court finds that Defendants' conduct does not have the effect of conveying the message that religion in general or any particular religion is favored because the cross here serves as a secular symbol of death or burial, not as a religious symbol. When symbols, such as crosses, take on secular as

well as religious connotations in a particular setting, they do not automatically constitute an endorsement of religion. For example, in *Van Orden*, the plurality held that a display of the Ten Commandments at a state capitol did not constitute a governmental endorsement of religion. 545 U.S. at 691. The Court acknowledged that the Ten Commandments possess a religious origin and retain religious significance today. *Id*. at 690 (Rehnquist, C.J., plurality opinion). The plurality, however, emphasized that the Ten Commandments also have an undeniable historical context. *Id.* at 689-91. Americans have a long tradition of displaying the Ten Commandments as a foundation for secular laws as well as religious commandments. *Id.* Thus, because the Ten Commandments "ha[ve] dual significance, partaking of both religion and government," their display did not automatically violate the Establishment Clause. *Id.* at 692.

Like the Ten Commandments, the cross possesses a religious origin and retains a religious significance today. And further, like the Ten Commandments, the cross has dual significance, as demonstrated by America's long tradition of displaying the cross as a symbol of death and burial. For example, American military cemeteries display crosses to represent the death of public servants. *See* Exhibit 1, Photographs A-X, UHPA Memorandum in Support of Motion for Summary Judgment (#177-3, 177-4). Cemeteries throughout the United States, including cemeteries in Utah, display row upon row of crosses to mark the burial spot of those who served their community and their country. *See*

Exhibit 2, Photographs A-J, UHPA Memorandum in Support of Motion for Summary Judgment (# 177-5). Even our community's popular culture has adopted the cross to communicate a secular message of death as demonstrated by the Utah Department of Alcoholic Beverage Control's use of the cross in its anti-drinking and driving billboard campaign. *See* Exhibit 4, Part 4, UHPA Memorandum in Support of Motion for Summary Judgment (# 177-10), Deposition Transcript of Michael Rivers, Exhibit 10.

A community may come to recognize over time that a traditionally religious symbol does not necessarily endorse religion. For example, in *Allegheny*, the Supreme Court noted that "[a]lthough Christmas trees once carried religious connotations, today they typify the secular celebration of Christmas." *Allegheny*, 492 U.S. at 616. This progression occurred as Americans who did not subscribe to Christian beliefs increasingly placed Christmas trees in their homes. *See id.* at 616-17.

Just as the Christmas tree evolved into a secular symbol of celebration, the cross has evolved into a symbol capable of communicating a secular message of death and burial. While the cross retains its religious meaning when placed in religious contexts, it has transformed into a representation of death and burial when placed in pop culture settings and when used as a memorial. Like the Christmas tree, which took on secular symbolism as Americans used the tree without subscribing to a particular religious belief, the cross has attained a secular status as Americans have used it to honor the place where

fallen soldiers and citizens lay buried, or had fatal accidents, regardless of their religious belief. And the progression of the cross from a religious to a secular symbol continues as crosses are increasingly used to symbolize death in advertising campaigns, films, television, and seasonal holiday decorations-frequently having nothing to do with religion or a particular religious belief. Consequently, the court finds a reasonable observer, aware of the history and context of the community would not view the memorial crosses as a government endorsement of religion.

Furthermore, this reasonable observer would be aware of the following regarding the "history and context of the community:" The Church of Jesus Christ of Latter-day Saints, Utah's largest religious demographic, does not, unlike most of the rest of Christianity, use the cross as a religious symbol. The demographic of those who do use the cross as a religious symbol are, on the other hand, a minority of the population.[7] With this understanding, it is unpersuasive to suggest that a reasonable person would conclude that the government's allowing the use of the cross here is to promote the minority churches which do use the cross; and more, it is

[7] If Utah is partitioned into three demo-graphic groups, (1) Christians who do not use the cross (mostly LDS), (2) Christians who do use the cross, and (3) religious non-Christians, atheists, and others who would not use the cross, then the size of groups (2) and (3) are roughly equal at around 20% of the population. Judicially Noticed Facts, Doc. # 247. In nearly every Establishment Clause case, the concern has been the establishment of a religion or religious belief that was held by the majority. In that sense, this case is unique.

illogical to suggest it is to promote the majority church which does not use the cross.

Plaintiffs' suggestion that the State Defendants' allowing the crosses to be placed on state land and to bear the UHP logo may be viewed as a promotion of Christianity in general over non-religion is a more rational theory, but is, nevertheless, one that must likewise fail. Again, Utah's unique demographics severely undercut this argument. A reasonable observer aware of the history, culture, circumstances, and context of the use of the memorial cross in this case would still fail to attribute a religious motive to the State Defendants' actions. Having made this finding, the court will distinguish *Friedman v. Board of County Commissioners*. 781 F.2d 777, 782 (1985) (reh'g en banc) (implying that the average observer would think that the cross on a county seal "recalls a less tolerant time and foreshadows its return"). An informed observer in this case would be more reasonable, neutral, and tolerant than the *Friedman* observer. In addition, the strictness of the *effects* prong analysis in *Friedman* is likely not applicable today because that case was decided prior to recent refinements in Establishment Clause jurisprudence, and the court there used the "average" person instead of the "reasonable observer" familiar with the culture and history. *Compare id.* ("average observer"), *with McCreary*, 545 U.S. at 866 ("reasonable observer"), *and Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 34-35 (2004) ("reasonable observer"). Even if *Friedman's* "average" person analysis were applied to the facts of

this case, the court would seriously question whether an "average" person would see these crosses and fear the return of a less tolerant time. In any event, the court is confident that a "reasonable" person would not. *See Friedman*, 781 F.2d at 782 (reh'g en banc). Should someone familiar with the history and demographics of Utah come across one of the cross memorials on the highway or the UHP parking lot, it is extremely unlikely, notwithstanding the reaction of Plaintiffs, that they would infer that the government's use of the cross was to endorse Christianity given the cross's non-use by the largest Christian demographic in the state. Plaintiffs' comment that the passing motorist will think that Christian troopers who use the cross are being propped up as "Christian heroes" while "[n]on-Christians are not part of the respect afforded [deceased Christian troopers]" is unconvincing at best and clearly without reasonable foundation. Plaintiff's Response in Opposition to UHPA's Second Motion for Summary Judgment, Doc. # 224 at 16. While we can expect the reasonable observer to be familiar with Utah history and its episodes of religious tension, *Bauchman*, 132 F.3d at 555, nothing in that history suggests religious intolerance on that level.

As discussed above, consideration of context is critical to the court's determination of the Establishment Clause question before it. The memorial crosses' position at the side of the road is devoid of context suggestive of, or conducive to, worship. True, there is no panoply of other more secular symbols, *Allegheny*, 492 U.S. at 596 (1989)

(discussing *Lynch v. Donnelly*, 465 U.S. 668 (1984)), or a diversity of other religious symbols to mitigate the cross' potential religious impact. On the other hand, like the Ten Commandments display in *Van Orden v. Perry*, there is likewise nothing in the display's context that would suggest religious symbolism. 545 U.S. at 702 (Breyer, J., concurring in the judgment). The simplicity of a white cross with a trooper's name and badge number boldly positioned on the cross arm, the UHP logo prominently positioned in the center, and a plaque with biographical information and a picture standing at the side of a highway with naught but Utah wilderness in either direction is a powerful juxtaposition and underscores the message of driver vigilance and safety, aiming for prevention of further unnecessary deaths in these remote locations.

The effect of the location of the two crosses adjacent to the UHP headquarters is similar. A reasonable observer seeing crosses with a UHP logo prominently displayed in the center standing by the road amidst urban sprawl would more likely receive the message of a trooper's death than government endorsement of religion. The court recognizes there may be issues presented by the crosses standing so close to an office of government, *see Capitol Square*, 515 U.S. at 801-02 (Stevens, J., dissenting), but it need not analyze these crosses outside the UHP headquarters as standing alone, *see Van Orden*, 545 U.S. at 702 (Breyer, J. concurring). The court in *Van Orden* was aware of the larger scheme into which the Ten Commandments monument fit. *Id.* We can deem the Court's reasonable observer to have been

aware of that larger context as well. In *Van Orden*, the Ten Commandments along with sixteen other monuments and 21 historical markers dotted the Texas capitol grounds and were meant to inform visitors of the "people, ideals, and events that compose Texan identity." *Van Orden*, 545 U.S. at 681 (Rehnquist, C.J., plurality opinion) (internal quotation and citation removed). So too can this court deem its reasonable observer to be aware of the existence of other UHPA cross memorials around the state and roadside cross memorials in general. Seen in that perspective, the memorial crosses' proximity to the government office becomes much less remarkable. They are just part of a larger government-endorsed secular memorial program.

Plaintiffs object not just to the location of the crosses, but also to the presence of the UHP logo. They assert that the superposition of the government's symbol on the crosses impermissibly sends the message that the government is endorsing Christianity. While there may be some, like Plaintiffs, who interpret the symbols that way, the court finds that given the context, this is not the response of a reasonable observer. Just as the locations of the memorials identify the place of a trooper's passing, the primary effect of including the UHP logo on the memorials is identification, not endorsement. The logo identifies the deceased as UHP troopers. And, as the cross is an effective and efficient symbol for communicating the message of a trooper's death to motorists speeding by, so too, the familiar UHP beehive logo is the most effective and

efficient symbol for communicating the deceased's affiliation with the UHP.[8]

Consequently, the court finds that given the context in which the memorial crosses are presented, the reasonable observer familiar with these circumstances, the community's culture, and the state's history will not see in this display, which combines the cross and the UHP logo, government attempting to endorse Christianity nor religion over non-religion.

3. Excessive Entanglement

The government's conduct did not foster excessive entanglement of church and state. Courts typically reserve the entanglement analysis for circumstances in which the state involves itself with a recognized religious activity or institution. *See, e.g., Lemon*, 403 U.S. at 606 (holding that two state statutory programs that aided teachers at non-public schools, including church-affiliated schools, would foster excessive involvement and entanglement of church and state). For example, in *Florey v. Sioux Falls School District*, the Eighth Circuit Court of Appeals held that a school board's adoption of rules permitting the observance of holidays with a religious and secular basis did not constitute excessive entanglement of church and state. 619

[8] The issue of the use of the UHP logo on the cross memorials is the subject of the State Defendants' Motion for Summary Judgment Docket # 168. The court's finding here grants the relief requested by the State and disposes of that motion.

F.2d 1311, 1318 (1980). The court noted that the Supreme Court's past entanglement cases reviewed governmental aid to sectarian institutions to avoid the danger of state repression of such institutions. Because this danger was absent and because no analogous entanglement existed, the court held that the school board's adopted rules did not constitute excessive entanglement of church and state. *Id.*

The Tenth Circuit followed a similar entanglement approach when it held that a school's choice to sing religious songs in various religious venues did not qualify as excessive entanglement. *Bauchman*, 132 F.3d at 556. The court noted that "[t]he entanglement analysis typically is applied to circumstances in which the state is involving itself with a recognized religious activity or institution." *Id.* Since that did not occur and since the court could not perceive any additional state involvement with recognized religious activity, the court held that the school's conduct did not constitute excessive entanglement of church and state. *Id.*

Unlike the typical Supreme Court cases in which the state provided governmental aid to sectarian institutions, Defendants, in the case at hand, did not provide aid to a sectarian institution. In contrast, the government merely permitted UHPA, a non-religious institution, to erect memorials for fallen officers. The state did not provide financial aid, otherwise involve itself with a recognized religion, or take any action that could reasonably be viewed as repressing a religious institution, neither directly, nor indirectly, by promoting a different religious

institution. Ultimately, there is no religious institution in this case with which the state might be entangled. There is only the UHPA, a non-religious institution. Accordingly, this Court follows the lead of the Eighth and Tenth Circuits and holds that Defendants' action did not constitute an excessive entanglement of church and state.[9]

Accordingly the court finds no Establishment Clause violation of either the First Amendment of the United States Constitution nor Article I of the Utah Constitution. While Plaintiffs may be accurate that the state constitutional provision regarding the establishment of religion is stronger and clearer than its federal counterpart, there are no facts in evidence from which this court could find a violation of the state provisions referenced by Plaintiffs. The undisputed facts and evidence before this court demonstrate that no public money or property was appropriated for or applied to any religious worship, exercise or instruction as a result of the UHPA memorial cross program. Furthermore, as stated above, the UHPA is not a religious organization so any incidental support offered to this program by the State Defendants cannot be construed to be "support of any ecclesiastical establishment." Utah Const. art. I, § 4.

By way of final comment, the court offers the following:

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[9] At the November 13, 2007 hearing, Plaintiffs conceded that their entanglement arguments were weak.

> [T]he Establishment clause does not compel a government to purge from the public's sphere all that in any way partakes of the religious. Such absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid.

Van Orden, 545 at 699 (Breyer, J., concurring in judgment) (citations omitted). Both the United States Constitution as well as the Utah State Constitution assure that government should show no preference toward religion in general nor any religion in particular. That said, it is not the place of law or government, using Establishment Clause jurisprudence, to exhibit hostility toward religion. Such "has no place in our Establishment Clause tradition." *Id.* at 704.

IV. Conclusion

Accordingly, the court grants Plaintiffs' motion for partial summary judgment on standing (# 110), denies Plaintiffs' motion for partial summary judgment (# 27), and grants Defendants' motions for summary judgment (#163, # 165, #170, #176).[10]

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[10] In oral argument, the UHPA raised the issue of non-public forum and addressed its effect on the Establishment Clause questions before the court. The State Defendants did the same in briefing submitted in support of a motion for summary judgment not specifically argued at the November 13, 2007 hearing. Having determined that the memorial crosses are not exclusively religious symbols and that no Establishment Clause violation has occurred as a result of the

SO ORDERED.

Dated this 20th day of November, 2007.

BY THE COURT:

/s/ David Sam
DAVID SAM
SENIOR JUDGE
U.S. DISTRICT COURT

State Defendants' limited participation in this UHPA program, the court need not address the issue and effect of Defendants' nonpublic forum arguments. Accordingly, State Defendants' motion for summary judgment (nonpublic forum) (Docket # 170) is rendered moot.

Filed December 20, 2010

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

AMERICAN ATHEISTS, INC., a Texas non-profit corporation; R. ANDREWS; S. CLARK; M. RIVERS,

Plaintiffs-Appellants,

v.

LANCE DAVENPORT, Superintendent, Utah Highway Patrol; JOHN NJORD, Executive Director, Utah Department of Transportation; F. KEITH STEPAN, Director Division of Facilities Construction and Management Department of Administrative Services,

Defendants-Appellees,

and

UTAH HIGHWAY PATROL ASSOCIATION,

Defendant-Intervenor-Appellee,

THE UNITARIAN UNIVERSALIST ASSOCIATION; THE UNION FOR REFORM JUDAISM; THE

No. 08-4061
(D.C. No. 2:05-CV-00994-DS)
(D. Utah)

SOCIETY FOR HUMANISTIC JUDAISM; THE INTERFAITH ALLIANCE; THE HINDU AMERICAN FOUNDATION; THE ANTI-DEFAMATION LEAGUE; EUGENE J. FISHER; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; AMERICAN HUMANIST ASSOCIATION; FOUNDATION FOR MORAL LAW; ROBERT E. MACKEY; THE AMERICAN LEGION; STATE OF COLORADO; STATE OF KANSAS; STATE OF NEW MEXICO; STATE OF OKLAHOMA; THE BECKET FUND FOR RELIGIOUS LIBERTY; GREGORY BELL; CURTIS BRAMBLE; ALLEN CHRISTENSEN; DAVID CLARK; MARGARET DAYTON; BRAD DEE; DAN EASTMAN; JOHN GREINER; WAYNE HARPER; JOHN HICKMAN; LYLE HILLYARD; SHELDON KILLPACK; PETER KNUDSON; MICHAEL MORLEY; WAYNE NIEDERHAUSER; HOWARD STEPHENSON; DENNIS STOWELL; AARON TILTON; JOHN VALENTINE; KEVIN VANTASSELL; CARLENE WALKER; CITY OF SANTA FE; UTAH SHERIFFS' ASSOCIATION,

Amici Curiae.

ORDER

Before **TACHA***, **KELLY, LUCERO, MURPHY, HARTZ, O'BRIEN, TYMKOVICH, GORSUCH,** and **HOLMES**, Circuit Judges.

This matter is before the court on defendants/appellees' *Petition For Rehearing With Suggestion For Rehearing En Banc*. Also before the court is the Utah Highway Patrol Association's *Petition For Rehearing En Banc*. We also have responses to both petitions from the plaintiffs/appellants.

Upon consideration, the requests for panel rehearing are granted in part. Specifically, the original panel opinion is amended at line 12 of page 29 replacing the word "universally" with the word "widely." In all other respects, the petition for panel rehearing is denied. A copy of the new panel opinion is attached to this Order.

Both suggestions for rehearing en banc were submitted to all of the judges of the court who are in regular active service and who are not recused in this matter. A poll was requested, and a majority voted to deny the en banc suggestion.

* Chief Judge Mary Beck Briscoe is recused in this matter and did not participate.

Judges Kelly, O'Brien, Tymkovich and Gorsuch would grant rehearing en banc. Judges Kelly and Gorsuch write separately, and those are attached to this order. Judge Kelly is joined by Judges O'Brien, Tymkovich, and Gorsuch, and Judge Gorsuch is joined by Judge Kelly.

Entered for the Court,

s/Elisabeth A. Shumaker

ELISABETH A. SHUMAKER
Clerk of Court

No. 08-4061, *American Atheists, Inc. v. Duncan*.

KELLY, Circuit Judge, dissenting from the denial of rehearing en banc, with whom **O'BRIEN**, **TYMKOVICH**, and **GORSUCH**, Circuit Judges, join.

The court's decision continues a troubling development in our Establishment Clause cases-the use of a "reasonable observer" who is increasingly hostile to religious symbols in the public sphere and who parses relevant context and history to find governmental endorsement of religion. *See Am. Atheists, Inc. v. Duncan*, 616 F .3d 1145 (10th Cir.2010). Despite assurance from the Supreme Court that the Establishment Clause does not require us to "purge from the public sphere all that in any way partakes in the religious," *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring) (citing *Marsh v. Chambers*, 463 U.S. 783 (1983)), the court's "reasonable observer" seems intent on doing just that. Thus, I respectfully dissent from the denial of rehearing en banc.

In striking down memorial crosses donated by the Utah Highway Patrol Association ("UHPA") to commemorate fallen troopers, the court erred in several respects. First, the court's analysis begins by effectively presuming that religious symbols on public property are unconstitutional. Such a presumption has no basis in our precedent and is unwarranted. Second, the court's reasonable observer does not sufficiently acknowledge the totality of the memorial crosses' physical

appearance, not to mention their context and history. This selective observation leads to the nominally "reasonable" observer's odd conclusion that the UHP is a sort of "Christian police" that favors Christians over non-Christians-a conclusion that has no support in the facts, and seems more based upon the additional facts contained in *Friedman v. Bd. of County Comm'rs of Bernalillo County*, 781 F.2d 777, 778, 782 (10th Cir.1985) (en banc) than any sort of reality. Third, the court equates the religious nature of the cross with a message of endorsement. Contrary to the court's decision, the Defendants did not bear the impossible burden of proving that Latin crosses are secular symbols. Rather, they needed to show only that the memorial crosses at issue conveyed a message of memorialization, not endorsement.

Background

A brief recitation of the operative facts is necessary. In 1998 the Utah Highway Patrol Association, a private organization that supports Utah Highway Patrol ("UHP") officers and their families, began a project to memorialize UHP troopers killed in the line of duty. *Am. Atheists*, 616 F.3d at 1150. The UHPA decided to honor the fallen troopers by placing large, white crosses near the locations of their deaths. *Id.* at 1150-51. The UHPA chose crosses because in the UHPA's opinion, "only a white cross could effectively convey the simultaneous message[s] of death, honor, remembrance, gratitude, sacrifice, and safety." *Id.* at 1151 (internal quotation marks and citation omitted). The crosses are

approximately twelve feet tall. *Id.* at 1150. The deceased officer's name and badge number are painted on the six-foot crossbar in large, black lettering. *Id.* The crosses also bear the UHP's beehive symbol, the deceased trooper's picture, and a plaque containing the officer's biographical information. *Id.* The State of Utah permitted the UHPA to erect approximately thirteen crosses on public property, but explicitly stated that it "neither approves or disapproves the memorial marker[s]." *Id.* at 1151 (internal quotation marks omitted).

In striking down the memorial crosses under the Establishment Clause, the court employed Justice O'Connor's endorsement test. *Am. Atheists*, 616 F.3d at 1156-57. Under that framework, governmental action violates the Establishment Clause if, as viewed by a "reasonable observer," it has the "effect of communicating a message of government endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

In my view, the court's application of the endorsement test is incorrect to the extent it: (1) effectively imposed a presumption of unconstitutionality on religious symbols in the public sphere; (2) employed a "reasonable observer" who ignored certain facts of the case and instead drew unsupported and quite odd conclusions; and (3) incorrectly focused on the religious nature of the crosses themselves, instead of the message they convey.

Discussion

A. Presumption of Unconstitutionality.

The court's application of the "endorsement test" begins with the correct and unremarkable observation that the Latin cross is "unequivocally a symbol of the Christian faith." *Am. Atheists*, 616 F.3d at 1160 (internal quotation marks and citation omitted). In the court's view, because the crosses are religious symbols standing alone, they "can only be allowed if their context and history avoid the conveyance of a message of governmental endorsement of religion." *Id.* Only after this initial determination does the court note-and promptly disregard-other physical features of the memorials, such as the officer's name and badge number, the photograph of the officer, and the plaque containing biographical information. *Id.* The court thus fails to grapple with these key contextual elements, instead treating them as facts insufficient to overcome the prior conclusion that the crosses endorse religion. *See id.* ("The fact that the cross includes biographical information about the fallen trooper *does not diminish the governmental message* endorsing Christianity.") (emphasis added); *id.* at 1161 ("Defendants point to four contextualizing facts that, they argue, *render these cross memorials sufficiently secular* to pass constitutional muster . . . .") (emphasis added).

This is a curious formulation of the issue. Of course, our job is to thoroughly analyze the appearance, context, and factual background of the

challenged displays *before* deciding the constitutional question. *See Lynch*, 465 U.S. at 679-80; *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 598-600 (1989); *Green v. Haskell Cnty. Bd. of Com'rs*, 568 F.3d 784, 799-805 (10th Cir. 2009); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1033-38 (10th Cir. 2008); *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1227-31 (10th Cir. 2005). All of the cases cited above involve a display with at least some religious content. *See Lynch*, 465 U.S. 668 (crèche); *Cnty. of Allegheny*, 492 U.S. 573 (crèche and menorah); *Green*, 568 F.3d 784 (Ten Commandments display); *Weinbaum*, 541 F.3d 1017 (various displays of Latin crosses); *O'Connor*, 416 F.3d 1216 (caricature of a Catholic bishop). Indeed, at issue in Lynch and Allegheny were statues of Mary, Joseph, and Jesus-quintessentially religious symbols. Yet, the Supreme Court carefully considered all relevant factors to decide whether the displays conveyed a message of endorsement, not to "save" them from presumptive unconstitutionality. *See Lynch*, 465 U.S. at 679-80; *Cnty. of Allegheny*, 492 U.S. at 598-600. Further, in County of Allegheny the Supreme Court rejected Justice Stevens's view that religious symbols on public property are presumptively unconstitutional. *See* 492 U.S. at 650 (1989) (Stevens, J., dissenting). Likewise, in *Green* we expressly rejected a presumption of unconstitutionality for displays of the Ten Commandments on public property. *See Green*, 568 F.3d at 798 ("We reject at the outset Mr. Green's argument that governmental displays of the text of the Ten Commandments are presumptively unconstitutional.") (internal quotation marks and citation omitted).

Besides being unprecedented, the court's approach is unwarranted. While it is undoubtedly correct that governments cannot erect or maintain symbols that convey "a message of governmental endorsement of religion," *Am. Atheists*, 616 F.3d at 1160, the converse is also true: governments *can* erect or maintain religious symbols that do *not* convey a message of endorsement. *See, e.g., Lynch,* 465 U.S. 668; *Weinbaum*, 541 F.3d 1017. Therefore, the mere presence of the memorial crosses, which are undoubtedly the "preeminent symbol of Christianity," *Am. Atheists*, 616 F.3d at 1160, tells us next to nothing. Without consulting all relevant factors, we simply cannot determine whether the challenged displays violate the Establishment Clause. To presume otherwise is to evince hostility towards religion, which the First Amendment unquestionably prohibits. *See Lynch*, 465 U.S. at 673. Thus, at the outset of this case the Defendants were not required to "secularize the message" of the memorial crosses. *Am. Atheists*, 616 F.3d at 1160. Rather, like in any other case, the Plaintiffs bore the initial burden of proof-here, showing that, given all the relevant context and history, the memorial crosses had the purpose or effect of endorsing religion.

B. The Unreasonable "Reasonable Observer."

As the court notes, the "reasonable observer" of our Establishment Clause jurisprudence "is kin to the fictitious reasonably prudent person of tort law." *Am. Atheists*, 616 F.3d at 1158 (internal quotation marks and citation omitted). His knowledge is "not

limited to the information gleaned simply from viewing the challenged display," and he "is presumed to know far more than most actual members of a given community." *Id.* at 1158-59 (internal quotation marks and citations omitted). Additionally, a court's ultimate task is not to determine "whether there is any person who could find an endorsement of religion, whether some people may be offended by the display, or whether *some* reasonable person might think the State endorses religion." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring) (internal quotation marks and citation omitted). Rather, the court must determine whether a fully informed, intelligent, and judicious "reasonable observer" would conclude that the display effectively sends a message that the government "prefer[s] one religion over another." *Am. Atheists*, 616 F.3d at 1156 (internal quotation marks and citations omitted).

In the Tenth Circuit, the extent of the reasonable observer's knowledge is vast. The reasonable observer is keenly aware of all the details of the challenged display, *see Weinbaum*, 541 F.3d at 1033-37; the display's physical setting, *see Green*, 568 F.3d at 805-06, *O'Connor,* 416 F.3d at 1228-29; the factual history surrounding the erection of the display, including the motives of the display's creator and the reasons for the display's design, *see Green*, 568 F.3d at 800-03, *Weinbaum*, 541 F.3d at 1037, *O'Connor*, 416 F.3d at 1228; the history of the relevant community and of the physical space occupied by the display, *see Weinbaum*, 541 F.3d at 1033-34, *O'Connor*, 416 F.3d at 1229; and other facts not

typically available to the average passerby. *See Green*, 568 F.3d at 801 (statements of county commissioners with regard to a Ten Commandments display); *id.* at 802 (photographs of the county commissioners standing in front of the monument); *Weinbaum*, 541 F.3d at 1033-34 (explanatory brochure produced by the City); *id.* at 1034 n.18 (the fact that other American towns often incorporate symbols of the City's name in the City's seal); *id.* at 1037 (the "Olympic spirit" evoked by the display's Spanish slogan); *O'Connor*, 416 F.3d at 1228 (brochure explaining the campuses' art display).

Contrast this knowledge with the reasonable observer in this case: although the observer properly notices the crosses' large size and the UHP's beehive symbol, he fails to take account of the officer's name and badge number painted on the crossbar in large, black letters, the officer's picture, and the biographical plaque. *Am. Atheists*, 616 F.3d at 1160. Ostensibly this is because "a motorist driving by one of the memorial crosses at 55-plus miles per hour may not notice, and certainly would not focus on, the biographical information." *Id.* However, the court itself noted that the reasonable observer's knowledge is "not limited to the information gleaned simply from viewing the challenged display." *Id.* at 1158 (internal quotation marks and citation omitted). This implies that the reasonable observer, at the very least, must "view[ ] the display itself." *Id.* (internal quotation marks and citation omitted). That the average member of the community may not make the effort to familiarize themselves with the crosses does not matter-"the reasonable observer is

presumed to know far more than most actual members of a given community." *Id.* at 1159 (internal quotation marks and citation omitted).

Beyond failing to acknowledge the entirety of the crosses' physical characteristics, the court's reasonable observer fails to adequately address the obvious and critical facts surrounding the memorial crosses-the crosses are erected near the location of the officer's death, the crosses were erected by a private organization for the purpose of memorializing the fallen trooper, the crosses were chosen by the trooper's family, and that Utah expressly declined to endorse the memorials. *Am. Atheists*, 616 F.3d at 1150-51. Failing to consider the relevant factual background stands in stark contrast to our precedent. In *Green*, for example, the reasonable observer considered the donor's ostensible religious motivations for approaching the Board of County Commissioners, the Board's decision timeline, and the Commissioner's subsequent actions in support of the display. *Green*, 568 F.3d at 800-01. Similarly, in *Weinbaum* the reasonable observer knew that schoolchildren, not the school district, designed the challenged mural, *Weinbaum*, 541 F.3d at 1037, and in *O'Connor* the reasonable observer considered prior displays that had been erected in the same location. *O'Connor*, 416 F.3d at 1228. Yet in this case the court's "reasonable observer" fails to consider nearly all the facts that cut against finding governmental endorsement.

The court's "reasonable observer" does not merely fail to consider all relevant facts. He quickly

departs from the evidence presented by the parties in favor of an unfounded and somewhat paranoid theory. Instead of concluding that the UHP adopted the crosses to memorialize the trooper whose name, picture, and biographical information is affixed to the cross-which, of course, is the conclusion supported by the record-the court's observer "link[s]" the UHP and Christianity by way of the UHP's beehive symbol. *Am. Atheists*, 616 F.3d at 1160. This "link" then leads the observer to conclude that the UHP is a sort of "Christian police" that discriminates in enforcing the law and hiring new employees. *Id.* at 1160-61. But why would a reasonable observer conjure up fears of religious discrimination given the far more plausible conclusion supported by the facts on the record-that the crosses memorialize fallen troopers? After all, a display's "[e]ffects are most often the manifestations of a motivating purpose." *Weinbaum*, 541 F.3d at 1033. Deciding an Establishment Clause case in part upon unfounded fears of discrimination, a sort of conspiratorial view of life, is an unwise approach. Things are often no more than what they appear. Yet, once unmoored from the facts of the case the reasonable observer's conclusion is limited only by the court's ability to imagine scenarios that would, if true, violate the Constitution.

The Court cites *Friedman v. Board of Cnty. Comm'rs* to support the reasonable observer's fear of discrimination. However, contrary to the decision in *Friedman*, where the County's seal, which was affixed to law enforcement vehicles, bore a cross surrounded by a "blaze of golden light," a flock of

sheep, and a Spanish phrase that translated to "With this, we conquer," 781 F.3d 777, 779 (10th Cir. 1985), in this case the observer's fear of discrimination is completely conjectural.

In support of the decision, the court repeatedly emphasizes the crosses' size. *Am. Atheists*, 616 F.3d at 1161, 1162, 1163 n.14. It is true that the twelve-foot memorials are considerably taller than most roadside crosses. However, the UHPA's explanation for the size is quite sensible: to ensure that passing motorists will take notice of the display and absorb its message of "death, honor, remembrance, gratitude, sacrifice, and safety." *Id.* at 1151.

Further, would the court's "reasonable" observer be satisfied if the crosses were smaller? Not likely. After all, both small and large crosses are the "preeminent symbol[s] of Christianity," *id.* at 1160, and it would be difficult for the UHPA to cram all the "contextualizing facts" the court desires onto a small cross. Focusing on the crosses' size also exacerbates an already acute problem in our Establishment Clause jurisprudence-providing governments and the public with notice of what actions violate the Constitution. If a twelve-foot cross is unconstitutional, how about eight feet? Six feet? Four? Two? And what is the guiding principle? Confronted with the court's decision, governments face a Hobson's choice: foregoing memorial crosses or facing litigation. The choice most cash-strapped governments would choose is obvious, and it amounts to a heckler's veto. Some might greet that

result with enthusiasm-but it is certainly not required by the Constitution.

The court also notes that, in briefing and in oral argument, Utah took the position that it would permit memorial crosses but not other religious symbols. *Am. Atheists*, 616 F.3d at 1152 n.2. Admittedly, Utah permitting only one religious symbol should give us pause in the appropriate case-but this is not the appropriate case. We really do not know how Utah officials would react if the UHPA requested permission to erect a symbol other than a cross, or how they would justify their decision. However, we do know the facts of this case. Here, the evidence shows that every family agreed to a cross. Id. at 1151. Thus, our role is not to postulate on the issue of whether Utah would send a message of endorsement if it permitted only crosses as memorials for deceased troopers.

C. Religious Symbolism of the Memorial Crosses.

Throughout the opinion, the court implies that the memorial crosses cannot simultaneously be religious symbols and survive challenge under the Establishment Clause. *See Am. Atheists*, 616 F.3d at 1161 ("We agree that a reasonable observer would recognize these memorial crosses as symbols of death. However, we do not agree that this nullifies their religious sectarian content because a memorial cross is not a generic symbol of death; it is a Christian symbol of death that signifies or memorializes the death of a Christian."); *id.* ("[T]here is no evidence that [the cross] is widely

accepted as a secular symbol."); *id.* at 1162 ("[T]he mere fact that the cross is a *common* symbol ... does not mean it is a *secular* symbol.").

These statements are both confusing and troubling. Just as the Establishment Clause does not "compel the government to purge from the public sphere all that in any way partakes in the religious," *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring) (citation omitted), it does not require the government to strip religious symbols of all religious significance as a condition precedent for display on public property. The court distinguishes this case from those addressing display of Christmas trees on the basis that Christmas trees have become secular symbols. *See Am. Atheists*, 616 F.3d at 1161. But the Supreme Court's decision addressing crèches are more on point. *See Lynch*, 465 U.S. at 671 (upholding a crèche displayed in a public park). *Lynch* did not hold that the statutes of Mary, Joseph, and Jesus had somehow morphed into secular symbols. Their religious nature was not stripped by the surrounding reindeer. *Id.* at 687. Rather, the Court held that these admittedly *religious* symbols did not violate the Establishment Clause. *Id.* at 685; see also *id.* at 692 (O'Connor, J., concurring) (applying the endorsement test to conclude that, despite the "religious and indeed sectarian significance of the crèche," the display did not endorse religion).

Likewise, in this case the Defendants did not face the impossible task of producing evidence "that the cross has been universally embraced as a marker for the burial sites of non-Christians or as a

memorial for a non-Christian's death." *American Atheists*, 616 F .3d at 1161. They did not bear the burden of proving that the cross "is widely accepted as a secular symbol." *Id.* That the cross is a "*Christian* symbol of death that signifies or memorializes the death of a *Christian*" is not fatal under the Establishment Clause. *Id.* Rather, the Defendants needed to prove only that the memorial crosses-which are clearly religious symbols-did not send the message that Utah endorses Christianity.

The court also concludes that the crosses did not "convey[] in this context a secular meaning that can be divorced from its religious significance." *Id.* at 1162. The court's inability to ascertain a nonreligious message is remarkable. Recently, a plurality of the Supreme Court recognized precisely what the court did not-that the white, Latin cross is a "symbol that . . . has complex meaning beyond the expression of religious views." *Salazar v. Buono*, 130 S. Ct. 1803, 1818 (2010) (plurality opinion). Indeed, Justice Kennedy recognized that "a Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people." *Id.* at 1820. Because crosses send at least a two-fold message, the plurality stated that "[a] cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs." *Id.* at 1818. The court in the case at bar instead takes the view of the three dissenting justices-that crosses

send a primarily religious message. *Id.* at 1829 (Stevens, J., dissenting).

While *Buono* does not directly control the case before us, the plurality's opinion supports the common-sense perception that the memorial crosses did indeed have a "secular meaning that [could] be divorced from their religious significance." *Am. Atheists*, 616 F.3d at 1162. This "secular meaning" or "secular message" is clear: to memorialize troopers who were killed in the line of duty. This is the message supported by the facts in the record, and it is a message fully consistent with the Constitution's Establishment Clause.

No. 08-4061, *American Atheists, Inc. v. Duncan*.

GORSUCH, Circuit Judge, joined by **KELLY**, Circuit Judge, dissenting from the denial of rehearing en banc.

I respectfully dissent from denial of rehearing *en banc*. Judge Kelly outlines several reasons why this decision is worthy of the full court's attention. I write to note two more.

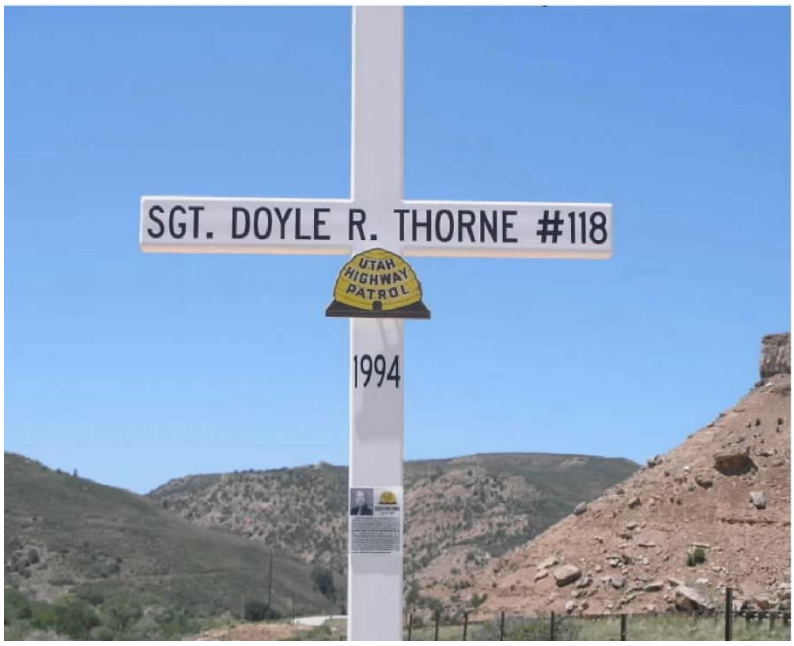
I

Our court has now *repeatedly* misapplied the "reasonable observer" test, and it is apparently destined to continue doing so until we are told to stop. Justice O'Connor instructed that the reasonable observer should not be seen as "any ordinary individual, who might occasionally do unreasonable things, but ... rather [as] a personification of a community ideal of reasonable behavior." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring) (internal quotations omitted). Yet, our observer continues to be biased, replete with foibles, and prone to mistake.

In this case, our observer starts with the biased presumption that Utah's roadside crosses are unconstitutional. Panel Op. at 25-26. He does so despite the fact a plurality of the Supreme Court only this year held that "[a] cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as

a statement of governmental support for sectarian beliefs." *Salazar v. Buono*, 130 S. Ct. 1803, 1818 (2010) (plurality op.). Our observer takes no heed of this direction. And when he looks to see whether he might overcome his initial bias, the task proves impossible because he disregards the very secularizing details-such as the fallen trooper's name inscribed on the crossbar-that might allow him to change his mind. He misses these integral components of the display, we're told, because "a motorist driving by one of the memorial crosses at 55-plus miles per hour may not notice, and certainly would not focus on, the biographical information." Panel Op. at 27. So it is that we must now apparently account for the speed at which our observer likely travels and how much attention he tends to pay to what he sees. We can't be sure he will even bother to stop and look at a monument before having us declare the state policy permitting it unconstitutional.

But that's not the end of things. It seems we must also take account of our observer's selective and feeble eyesight. Selective because our observer has no problem seeing the Utah highway patrol insignia and using it to assume some nefarious state endorsement of religion is going on; yet, mysteriously, he claims the inability to see the fallen trooper's name posted directly above the insignia. *Id.* at 26-27.



And feeble because our observer can't see the trooper's name even though it is painted in approximately 8-inch lettering across a 6-foot cross-bar-the same size text used for posting the words "SPEED LIMIT" alongside major interstate highways. See Federal Highway Administration, Manual on Uniform Traffic Control Devices for Streets and Highways 46 (2009); Federal Highway Administration, Standard Highway Signs 1-10 (2004). What's more, many of Utah's memorials aren't even on highways: four of the thirteen are adjacent to side-streets where "55-plus" speeds aren't common-including two in front of a Utah Highway Patrol field office. All the same, our observer plows by, some combination of too blind and too fast to read signs adequate for interstate highway traffic. Biased, selective, vision impaired,

and a bit of a hot-rodder our observer may be, but the reasonable observer of Justice O'Connor's description he is not.

Still, if this case could be dismissed as a "one off" misapplication of the reasonable observer test, that might make it less worthy of review. But it can't be so easily shrugged off. Two years ago we applied a similar misconstruction of the reasonable observer test to become the only circuit court since the Supreme Court's decision in *Van Orden v. Perry*, 545 U.S. 677 (2005), to order the removal of a Ten Commandments display that was admittedly erected without a religious purpose and in the context only of a larger secular historical presentation. *See Green v. Haskell Cnty. Bd. of Commr's*, 574 F.3d 1235, 1248-49 (10th Cir.2009) (Gorsuch, J., dissenting). There, like here, we did so only by employing an observer full of foibles and misinformation. *See id.* at 1246-58. Now we become the only circuit since *Van Orden* to order the removal of memorial highway crosses to fallen public servants, using this same strikingly unreasonable observer who bears none of the traits Justice O'Connor described. Thus, the pattern is clear: we will strike down laws other courts would uphold, and do so whenever a reasonably biased, impaired, and distracted viewer might confuse them for an endorsement of religion.

II

And this raises an even larger question. The court's holding does and must rest on the view that anything a putatively "reasonable observer" could

think "endorses" religion is constitutionally problematic. Indeed, the result in this case could hardly be achieved under any different test. It is undisputed that the state actors here did *not* act with any religious purpose; there is *no* suggestion in this case that Utah's monuments establish a religion or coerce anyone to participate in any religious exercise; and the court does not even render a judgment that *it thinks* Utah's memorials *actually* endorse religion. Most Utahans, the record shows, don't even revere the cross. Thus it is that the court strikes down Utah's policy *only* because it is able to imagine a hypothetical "reasonable observer" who *could think* Utah means to endorse religion-even when it doesn't.

But whether even the true reasonable observer/endorsement test remains appropriate for assessing Establishment Clause challenges is far from clear. A majority of the Supreme Court in *Van Orden* declined to employ the reasonable observer/endorsement test in an Establishment Clause challenge to a public display including the Ten Commandments. *See* 545 U.S. at 687 (Rehnquist, J.); *id.* at 700 (Breyer, J., concurring). Following the Supreme Court's cue, at least three of our sister circuits seem to have rejected the test, at least when it comes to passive public displays like Utah's. *See ACLU Nebraska Found. v. City of Plattsmouth, Neb.*, 419 F.3d 772, 778 & n.8 (8th Cir.2005); *Card v. City of Everett*, 520 F.3d 1009, 1018 (9th Cir. 2008); *Myers v. Loudoun Cnty. Pub. Schs.*, 418 F.3d 395, 402 (4th Cir. 2005). And this year a plurality of the Supreme Court questioned

whether even the true "reasonable observer" framework is always appropriate for analyzing Establishment Clause questions. *See Buono*, 130 S. Ct. at 1819.

The court today, however, declines to consider any of these developments, much as it declined to do so in *Green*. *See* 574 F.3d at 1245 (Gorsuch, J., dissenting). So it is that our opinions in this field continue to apply (or misapply) a reasonable observer/endorsement test that has come under much recent scrutiny-and, worse, our opinions do so without stopping to acknowledge, let alone grapple with, the questions others have raised about the test. It is a rare thing for this court to perpetuate a circuit split without giving due consideration to, or even acknowledging, the competing views of other courts or recent direction from the High Court. But that's the path we have taken.

Neither is this any humdrum disagreement where uniformity of federal law may not be a pressing concern. Where other courts permit state laws and actions to stand, we strike them down. And the test we use to do so rests on an uncertain premise-that this court possesses the constitutional authority to invalidate not only duly enacted laws and policies that *actually* "respect[] the establishment of religion," U.S. Const. amend. I, but also laws and policies a reasonable hypothetical observer could *think* do so. And, in this circuit's case, to go even a step further still, claiming the authority to strike down laws and policies a conjured observer could *mistakenly* think respect an establishment of

religion. That is a remarkable use of the "awesome power" of judicial review, *Williams v. United States*, 401 U.S. 667, 678 (1971) (Harlan, J., concurring in part and dissenting in part); *cf. Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 768 (1995) (plurality op.), and it would have been well worth our while at least to pause to consider its propriety before rolling on.

Filed December 29, 2010

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

AMERICAN ATHEISTS, INC., a Texas non-profit corporation; R. ANDREWS; S. CLARK; M. RIVERS,

Plaintiffs-Appellants,

v.

LANCE DAVENPORT, Superintendent, Utah Highway Patrol; JOHN NJORD, Executive Director, Utah Department of Transportation; F. KEITH STEPAN, Director Division of Facilities Construction and Management Department of Administrative Services,

Defendants-Appellees,

and

UTAH HIGHWAY PATROL ASSOCIATION,

Defendant-Intervenor-Appellee,

THE UNITARIAN UNIVERSALIST ASSOCIATION; THE UNION FOR REFORM JUDAISM; THE SOCIETY FOR HUMANISTIC

No. 08-4061

JUDAISM; THE INTERFAITH ALLIANCE; THE HINDU AMERICAN FOUNDATION; THE ANTI-DEFAMATION LEAGUE; EUGENE J. FISHER; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; AMERICAN HUMANIST ASSOCIATION; FOUNDATION FOR MORAL LAW; ROBERT E. MACKEY; THE AMERICAN LEGION; STATE OF COLORADO; STATE OF KANSAS; STATE OF NEW MEXICO; STATE OF OKLAHOMA; THE BECKET FUND FOR RELIGIOUS LIBERTY; GREGORY BELL; CURTIS BRAMBLE; ALLEN CHRISTENSEN; DAVID CLARK; MARGARET DAYTON; BRAD DEE; DAN EASTMAN; JOHN GREINER; WAYNE HARPER; JOHN HICKMAN; LYLE HILLYARD; SHELDON KILLPACK; PETER KNUDSON; MICHAEL MORLEY; WAYNE NIEDERHAUSER; HOWARD STEPHENSON; DENNIS STOWELL; AARON TILTON; JOHN VALENTINE; KEVIN VANTASSELL; CARLENE WALKER; CITY OF SANTA FE; UTAH SHERIFFS' ASSOCIATION,
Amici Curiae.

ORDER

Before **TACHA**, **EBEL**, and **HARTZ**, Circuit Judges.

This matter is before the court on the defendants/appellees' *Motion To Stay Issuance of the Mandate*. Upon consideration, the request is granted. The mandate in this matter shall be stayed for 90 days, or in the alternative until a petition for writ of certiorari is filed in the United States Supreme Court. If a petition for the writ is filed, the stay of the mandate shall continue until the Supreme Court's final disposition. The defendants/appellees shall notify this court in writing forthwith if a petition is filed, and shall advise of the date of filing with the Supreme Court. *See* Fed. R. App. P. 41(d)(B).

Entered for the Court,

s/Elisabeth A. Shumaker

ELISABETH A. SHUMAKER
Clerk of Court

Filed March 28, 2008

United States District Court

Central Division for the District of Utah

American Atheists, Inc, R. Andrews, S. Clark and M. Rivers	**JUDGMENT IN A CIVIL CASE**
v.	
Col. Scott T. Duncan, John Hjord, D'Arcy Pignanelli, F. Keith Stepan	
Utah Highway Patrol Assoc. Intervenor Defendant	Case Number: 2:05 cv 994 DC

IT IS ORDERED AND ADJUDGED

that pursuant to the orders of the court granting summary judgment in favor of the defendants and defendant intervenor and denying the plaintiffs' motion to amend, for new trial and for relief from judgment, judgment is entered in favor of the defendants and the defendant intervenor and plaintiffs' cause of action is dismissed.

March 28, 2008
Date

D. Mark Jones
Clerk of Court

s/Deputy Clerk
(By) Deputy Clerk

Enrolled Copy **H.C.R. 4**

RESOLUTION SUPPORTING UTAH HIGHWAY PATROL USE OF WHITE CROSSES AS ROADSIDE MEMORIALS

2006 GENERAL SESSION

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Neal B. Hendrickson
David L. Hogue
Kory M. Holdaway
Gregory H. Hughes
Fred R. Hunsaker
Eric K. Hutchings
Bradley T. Johnson
Todd E. Kiser
Bradley G. Last
Rebecca D. Lockhart
Steven R. Mascaro
John G. Mathis
Ronda Rudd Menlove
Karen W. Morgan
Michael T. Morley
Carol Spackman Moss
Joseph G. Murray
Merlynn T. Newbold
Michael E. Noel
Curtis Oda
Patrick Painter
LaWanna Lou Shurtliff
Aaron Tilton
Stephen H. Urquhart
Mark W. Walker
Peggy Wallace
Scott L Wyatt

LONG TITLE

General Description:

This concurrent resolution of the Legislature and the Governor supports the placement of white crosses as roadside memorials to honor patrol officers killed in the line of duty.

Highlighted Provisions:

This resolution:

- expresses support for the Utah Highway Patrol's placement of white crosses, or other appropriate symbols as requested by the family, as memorials to Highway Patrol Officers who have been killed in the line of duty.

Special Clauses:

None

Be it resolved by the Legislature of the state of Utah, the Governor concurring therein:

WHEREAS, since the creation of the Utah Highway Patrol in 1935, 14 Highway Patrol officers have been killed in the line of duty;

WHEREAS, the 14 Utah Highway Patrolmen who have been killed in the line of duty are Patrolman George "Ed" VanWagenen and Troopers

Armond A. "Monty" Luke, George Dee Rees, Charles D. Warren, John R. Winn, William J. Antoniewicz, Robert B. Hutchings, Ray Lynn Pierson, Daniel W. Harris, Joseph "Joey" S. Brumett III, Dennis "Dee" Lund, Doyle R. Thorne, Randy K. Ingram, and Thomas S. Rettberg;

WHEREAS, for the families of these officers who have paid the ultimate price for their service, there is often very little that can be done to stem the tide of their grief and suffering, or to help them move on with their lives;

WHEREAS, the families of these officers killed in the line of duty have been involved in, and have supported, the creation of roadside memorials that are placed near the location of the incidents that caused the deaths of their loved ones;

WHEREAS, each memorial represents a Utah Highway Patrol officer who died in the line of duty and service to the state of Utah and its citizens;

WHEREAS, a white cross has become widely accepted as a symbol of a death, and not a religious symbol, when placed along a highway;

WHEREAS, the memorials remind the citizens of Utah and this nation of the price that is too often paid for safety and freedom;

WHEREAS, the memorials also console the family members left behind, who too often consist of young mothers and young children;

WHEREAS, the primary feature of the memorials is a white cross, which was never intended as a religious symbol, but as a symbol of the sacrifice made by these highway patrol officers;

WHEREAS, the beehive emblem, which is also the official state emblem, is attached to the cross because the emblem is worn as part of the official Utah Highway Patrol uniform;

WHEREAS, the purchase and placement of these memorials has been accomplished with private funds only; and

WHEREAS, given the heartfelt yet nonsectarian intentions of the memorials, removing or tampering with them would clearly convey an absence of concern, respect, and recognition of the sacrifices made by these officers and their families:

NOW, THEREFORE, BE IT RESOLVED that the Legislature of the state of Utah, the Governor concurring therein, express support for the Utah Highway Patrol's use of white crosses, or other appropriate symbols as requested by the family, as roadside memorials as a means to pay tribute to the heroes from the ranks of the Utah Highway Patrol who have fallen and to their families.

BE IT FURTHER RESOLVED that a copy of this resolution be sent to the surviving spouse or nearest relative of each Utah Highway Patrol Officer who has been killed in the line of duty and service to the

citizens of Utah, the Utah Highway Patrol, and the Utah Highway Patrol Association.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

AMERICAN ATHEISTS, INC., a Texas non-profit corporation; R. ANDREWS, S. CLARK and M. RIVERS, Plaintiffs, vs. COLONEL SCOTT T. DUNCAN, Superintendent, Utah Highway Patrol; JOHN NJORD, Executive Director, Utah Department of Transportation; D'ARCY PIGNANELLI, Executive Director, Department of Administrative Services; and F. KEITH STEPAN, Director, Division of Facilities Construction and Management Department of Administrative Services, Defendants. UTAH HIGHWAY PATROL ASSOCIATION, a Utah non-profit corporation, Defendant/Intervener.	Case No. 2:05-CV-00994 DS (Judge David Sam) DEPOSITION OF: STEPHEN R. CLARK
TAKEN AT:	Mylar Law, P.C. 6925 Union Park Center, Suite 600

DATE:	Salt Lake City, Utah 84047-4141
TIME:	March 29, 2007 2:54 p.m.
REPORTED BY:	Kelly L. Wilburn, CSR, RPR

dm DEPOMAXMERIT
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* * *

[10] [R. 1510] Q. Are you aware that the crosses at issue in this litigation were erected by a private organization to honor fallen state troopers?

A. Yes.

Q. And you've seen some of the memorials at issue in this case, correct?

A. Yes.

Q. Mr. Clark, I'm gonna show you what's already been marked as Deposition Exhibit 15 and Deposition Exhibit 16. Do you recognize the memorials in that --in those pictures?

A. Yes, I do.

Q. Are those the memorials that you have personally seen?

A. Yes.

Q. Okay. When you look at those memorials do

[11] [R. 1511] they signify to you that someone has died?

A. Yes.

Q. And given that they have a name on them, and a badge number, and a plaque, does it signify to you that a trooper has died?

A. Yes.

Q. When was the first time you remember seeing those crosses?

A. About 2002, I believe.

Q. Okay. And what were you doing when you saw those for the first time?

A. I was driving on the Frontage Road, or service road as some people have called it.

Q. Okay.

A. And, and I noticed them. They were easy -- very easy to notice.

* * *

[20] [R. 1520] Q. And you went up to the cross and -- or the memorial and you -- did you look at what was on the memorial?

A. Yes.

Q. Did you notice there was a plaque on the memorial?

A. Yes.

Q. And there was a picture of a trooper on the memorial?

A. Yes.

Q. Do you remember if you read what was on the plaque?

A. I did.

Q. Okay. Do you recall the contents of the plaque?

A. No.

Q. Okay. Was it your impression that that memorial was there to honor the fallen state trooper?

A. Yes.

Q. And in your opinion does that memorial honor the fallen state trooper?

A. Yes.

Q. And how so?

A. Well, it, it presents biographical information of how he died, although I don't recall

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

AMERICAN ATHEISTS, INC., a Texas non-profit corporation; R. ANDREWS, S. CLARK and M. RIVERS, Plaintiffs, vs. COLONEL SCOTT T. DUNCAN, Superintendent, Utah Highway Patrol; JOHN NJORD, Executive Director, Utah Department of Transportation; D'ARCY PIGNANELLI, Executive Director, Department of Administrative Services; and F. KEITH STEPAN, Director, Division of Facilities Construction and Management Department of Administrative Services, Defendants. UTAH HIGHWAY PATROL ASSOCIATION, a Utah non-profit corporation, Defendant/Intervener.	Case No. 2:05-CV-00994 DS (Judge David Sam) DEPOSITION OF: MICHAEL KELSEY

TAKEN AT: Mylar Law, P.C.
6925 Union Park Center, Suite 600

DATE:	Salt Lake City, Utah 84047-4141
TIME:	March 28, 2007 3:42 p.m.
REPORTED BY:	Kelly L. Wilburn, CSR, RPR

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* * *

[12] [R. 1593] Q. Okay. So I think you have started to indicate about what this case is about. What is your understanding exactly of what this litigation

[13] [R. 1594] involves?

A. It involves the shape of a memorial to Highway Patrolmen who have died.

Q. So you understand that memorial symbols have been erected to honor fallen state troopers?

A. Yes.

Q. Are you aware of who erected those memorial symbols?

A. Utah highwaymen of -- a private organization that did this.

* * *

[22] [R. 1603] Q. And the first time you saw them, were they on the right side of the road or the left side of the road?

A. I was -- I think I came in on 20 at that time, and so they were on my left. I'm going east.

Q. And can you see them in both directions?

A. Yes.

Q. Okay. The first time you saw those crosses, did you stop to look at them?

A. I believe it was the first time, but I can't say that for certain.

Q. But at some point you stopped to examine them?

A. Yeah. It was early on. I mean, it might have been the first trip. I don't know. I can't remember.

Q. These memorial crosses, do they communicate to you that someone has died at this spot?

A. Yes.

Q. And given the fact that they have a trooper's name on it, and the logo, and a year, does it communicate to you that a Utah Highway Patrol trooper died at that spot?

A. Yes.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

AMERICAN ATHEISTS, INC., a Texas non-profit corporation; R. ANDREWS, S. CLARK and M. RIVERS, Plaintiffs, vs. COLONEL SCOTT T. DUNCAN, Superintendent, Utah Highway Patrol; JOHN NJORD, Executive Director, Utah Department of Transportation; D'ARCY PIGNANELLI, Executive Director, Department of Administrative Services; and F. KEITH STEPAN, Director, Division of Facilities Construction and Management Department of Administrative Services, Defendants. UTAH HIGHWAY PATROL ASSOCIATION, a Utah non-profit corporation, Defendant/Intervener.	Case No. 2:05-CV-00994 DS (Judge David Sam) DEPOSITION OF: JOEL LAYTON

TAKEN AT: Mylar Law, P.C.
6925 Union Park Center, Suite 600

DATE:	Salt Lake City, Utah 84047-4141
TIME:	April 2, 2007 2:19 p.m.
REPORTED BY:	Kelly L. Wilburn, CSR, RPR

* * *

[18] [R. 1708] yeah.

Q. All right. Do you have any evidence or information on why those memorials were erected?

A. To -- I assume they were for a fallen Highway Patrolman that died in that general vicinity.

Q. Is it --

A. In the line of duty.

Q. Is it correct to say that those -- that, that the display that's off, off of Interstate 80 that you just talked about, and also the displays that are on around 53rd South on the Frontage Road, is it correct to say that those are memorializing troopers that have died in the line of duty?

A. Yes.

Q. And that -- is it pretty obvious to recognize that when you see that? When you see those displays?

A. I don't understand that question. What do you?

Q. You didn't think it was -- did you think it was anything else besides a memorial to a fallen trooper?

A. Oh. No, I assumed that's what that was, yes.

* * *

Filed July 2, 2007

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Attorneys for Intervenor-Defendant UHPA

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

AMERICAN ATHEISTS, INC., *et al.*, Plaintiffs, vs. **COLONEL SCOTT T. DUNCAN**, *et al.*, Defendants, **UTAH HIGHWAY PATROL ASSOCIATION**, Intervenor-Defendant.	Case No.: 02:05-V-00994 DS **DECLARATION OF ROBERT E. MACKEY IN SUPPORT OF INTERVENOR-DEFENDANT UHPA'S MOTION FOR SUMMARY JUDGMENT** Judge David Sam

I, Robert E. Mackey, state that the following facts are true and based upon my personal knowledge:

1. I am a United States citizen who is over the age of eighteen and reside in Hamilton, Montana, within Ravalli County.

2. My son, Donald K. Mackey, was an experienced wildland firefighter who was a "smokejumper" with the United States Forest Service from 1987 until 1994. Prior to that time he served on the Bitterroot Hotshot team, a firefighting crew that generally is among the first crews to attack a forest fire.

3. On July 5, 1994, Don, in the company of

other firefighters, was assigned to the "South Canyon Fire" that was burning on Storm King Mountain near Glenwood Springs, Colorado. A very complete story of the tragedy that unfolded is told in the book, *Fire on the Mountain* by John N. Maclean, published by Washington Square Press in 1999.

4. The fire was burning on steep hillsides through thick brush and trees. On July 6, around 4 p.m., the fire "blew up" and began to burn wildly uphill.

5. Don and the other firefighters were forced to abandon their fight against the fire and seek shelter. The firefighters headed uphill on the west flank of the fire, searching for a safe place to escape the flames.

6. At approximately 4:11 p.m., the fire overtook Don's crew. Within a few minutes, Don and thirteen other firefighters on the mountain died in the fire.

7. Evidence found after the fire, and reports from fire survivors strongly indicate, that Don's last act was to turn back into the fire and run downhill in a last-ditch effort to help other firefighters who were still below him, nearer to the flaming front of the fire. His body was found within inches of the body of one of those firefighters, Bonnie Holtby.

8. Soon after the fire, local citizens and other firefighters spontaneously placed simple wood crosses where each firefighter's body had been found.

9. Immediately after I learned that Don died, I began thinking about how these firefighters should be remembered. About two weeks after the fire, I visited Storm King Mountain with my wife and three daughters, and I had the idea then to use crosses to mark the location where each firefighter died.

10. I chose the cross because it is such an obvious symbol of death. Anyone who sees the crosses on Storm King knows exactly what they represent—people died on this mountain.

11. In April 1995, I organized the effort to install fourteen granite crosses on the mountain, each erected with the family's and the government's permission. At the request of the family of Terri Hagen, a Native American firefighter, her cross includes a circle of black steel symbolizing the "circle of life" that is central to her heritage.

12. The cost of putting up these crosses was covered by private donations; the labor to install them was donated.

13. Attached is a photograph of Don's cross (Exhibit A).

14. Volunteers from the U.S. Air Force Academy came out and constructed a trail so that the public could visit each cross.

15. Installing the crosses required the use of about 10,000 pounds of rock, concrete and other supplies.

16. I have visited the crosses many times in the past years, and each time I find many small gestures to these fallen men and women. Visitors leave behind firefighting patches, helmets, notes and tokens of a firefighter's life—even a can of beer or a can of chewing tobacco can be found up there. Just like these crosses, they are symbols of respect and mourning for these firefighters.

17. The crosses are located on federal Bureau of Land Management property, with the permission of the BLM.

18. As the organizer for this effort, I know that the crosses were placed there to memorialize the deaths of the firefighters. They have nothing to do with churches, religious denominations or any effort to impose anyone's faith on anyone else.

19. It has been almost twelve years since my son died. There is no "closure" to the pain; time does not heal every hurt. If anyone attempted to take those crosses down, I would stop them. Those crosses belong to those who died.

Further, affiant sayeth nought.

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DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 and subject to the laws of Montana that the foregoing is true and correct.

Executed this 29 day of April, 2006

s/Robert E. Mackey
Robert E. Mackey

Permit Number 00-4376-2

Special Limitations for memorial marker permits:

1-80 ECHO REST AREA MP 166.7 SUMMIT CO

Whereas, the UDOT does have responsibility and authority over the property and location of this memorial marker and neither approves or disapproves the memorial marker.

The UDOT shall remain the owner of the real property on which said landscape facilities were installed. Further, if UDOT must use this property, no reimbursement will be made for the improvements. Furthermore, **IF UDOT DETERMINES THAT THE MEMORIAL MARKER BECOMES A HAZARD OR A LIABILITY, IT WILL BE REMOVED AT OWNER'S EXPENSE**.

The Highway Patrol Association shall at all times protect and indemnify and save harmless the UDOT from any and all claims, demands, judgements, costs, expenses and *all* damage of every kind and nature made, rendered, or incurred by or in behalf of any person or corporation whatsoever, in any manner due to arising out of injury to or in death of any person, or damage to property of any person or persons whomsoever, including the parties hereto and their employees, or in any damage to property of any person or persons whomsoever, including the parties hereto and their employees, or in any

manner arising from or growing out of the construction, maintenance operation or repair of project, or the failure to properly construct or maintain the same, and from all costs and expenses, including attorneys' fees connected in anyway with the matter and **The Highway Patrol Association understands that it is not UDOT's responsibility to defend the existence or the shape of the memorial marker on UDOT property**.

Filed December 23, 2005

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Attorney for Intervenor-Defendant

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

AMERICAN ATHEISTS, INC., a Texas non-profit corporation; **R. ANDREWS**, **S. CLARK** and **M. RIVERS**,	:	
Plaintiffs, vs.	:	**DECLARATION OF KAMERON THORNE IN SUPPORT OF MOTION TO INTERVENE**
COLONEL SCOTT T. DUNCAN, Superintendent, Utah Highway Patrol; **JOHN NJORD,** Executive Director, Utah Department of Transportation; **D'ARCY PIGNANELLI**, Executive Director,	:	Case No.: 02:05-CV-00994 DS Judge David Sam

Department of Administrative Services; and **F. KEITH STEPAN**, Director Division of Facilities Construction and Management Department of Administrative Services,	:
Defendants,	:
UTAH HIGHWAY PATROL ASSOCIATION,	:
Applicants for Intervention.	:

I, KAMERON THORNE, having been duly sworn, under oath, state that the following statements are true and based upon my personal knowledge:

1. I am a United States citizen who is over the age of eighteen.

2. I am a resident of Salt Lake County, Utah.

3. My father, Trooper Doyle R. Thorne served as a Utah Highway Trooper from July 16, 1975 until he was killed in the line of duty on July 30, 1994.

4. My father earned a master's degree from

Utah State University, and held the rank of Captain, USMC, in Vietnam. He was a helicopter pilot, renowned for his ability to evacuate the wounded from fire zones.

5. My dad worked in law enforcement for the State of Utah ever since I was five years old. He joined the Utah Highway Patrol on July 16, 1975. In December 1988, dad transferred to the UHP Aero Bureau and was assigned helicopter duty. He flew many rescue missions during the next five years. My father loved his job because he loved serving people.

6. He always seemed to be serving others. He volunteered with the cub scouts, helped neighbors move, and chopped firewood for needy people during the winter months. He was a kind and honest man who sometimes worked two or three jobs to provide for our family.

7. On July 30 1994, Dad responded to a call to search for a missing two-year-old girl in Duchesne County. The girl was located and Dad began his return flight to Salt Lake City. The return route required high altitudes to clear the mountain range. Dad radioed a "MayDay" and his craft disappeared from radar contact. His exact grid location was unknown and the craft did not have a transponder. It took three days to locate my father in the downed helicopter. The injuries he suffered in the crash killed him instantly.

8. The day before my dad died, he watched my younger sister get married.

9. My father died doing two things he loved: flying and serving.

10. In 1999, the Utah Highway Patrol Association contacted my mother and asked if they could erect a cross in memory of my dad. My mom said they could do so.

11. Initially when they erected the memorial, I was simply glad that my father would be remembered. Since then, the memorial has taken on much greater meaning.

12. Numerous people have told me orally and through letters and emails that the memorial reminds them of my father and his life of service. People have told me that they remember my dad as a hero.

13. I have taken my two eldest sons to the site and told them about their grandfather.

14. The memorial represents my father's legacy of service to the people of Utah. This legacy would be lost if the memorial were removed.

15. A rock or plaque could not appropriately commemorate my father's legacy. At sixty-five miles per hour, such a marker would symbolize a historical event at best, but would fail to capture my father's humanity and service.

16. The cross declares that "someone died here." The Trooper's beehive logo declares that that someone was a highway patrol trooper that gave the ultimate sacrifice in protecting and serving his fellow citizens. To me, no other symbol could so appropriately honor my father's sacrifice, service, and dedication to the people of Utah.

17. The Utah Highway Patrol Association speaks for me in honoring and preserving the memory and the service that my dad gave to the people of Utah.

18. I respectfully request that the Court grant the Utah Highway Patrol Association's motion to intervene.

//

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed this 21 day of December, 2005.

s/ Kameron Thorne
Kameron Thorne