

No. 10-1297

---

---

**In the Supreme Court of the United States**

---

LANCE DAVENPORT, JOHN NJORD, AND F. KEITH STEPAN,  
*Petitioners,*

v.

AMERICAN ATHEISTS, INC., R. ANDREWS,  
S. CLARK, AND M. RIVERS,  
*Respondents.*

---

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

---

**BRIEF FOR THE STATES OF LOUISIANA, ALABAMA, ALASKA,  
ARKANSAS, COLORADO, FLORIDA, IDAHO, INDIANA, KANSAS,  
KENTUCKY, MICHIGAN, MISSISSIPPI, MISSOURI, NEBRASKA,  
OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH  
DAKOTA, TEXAS AND WASHINGTON AS *AMICI CURIAE*  
IN SUPPORT OF PETITIONERS**

---

JAMES D. "BUDDY" CALDWELL  
Louisiana Attorney General  
S. KYLE DUNCAN  
Appellate Chief  
*Counsel of Record*

ROSS W. BERGETHON  
Assistant Attorney General  
LOUISIANA DEPARTMENT OF JUSTICE  
P.O. Box 94005  
BATON ROUGE, LA 70804  
(225) 326-6716  
DuncanK@ag.state.la.us

May 23, 2011

*Counsel for State Amici Curiae  
[Additional counsel on inside cover]*

---

---

Luther Strange  
*Attorney General of  
Alabama*  
501 Washington Ave.  
Montgomery, AL 36130

John J. Burns  
*Attorney General of  
Alaska*  
P.O. Box 110300  
Juneau, AK 99811

Dustin McDaniel  
*Attorney General of  
Arkansas*  
323 Center St., Ste. 200  
Little Rock, AR 72201

John W. Suthers  
*Attorney General of  
Colorado*  
1525 Sherman St.  
Denver, CO 80203

Pamela Jo Bondi  
*Attorney General of  
Florida*  
The Capitol, PL-01  
Tallahassee, FL 32399

Lawrence G. Wasden  
*Attorney General of Idaho*  
P.O. Box 83720  
Boise, ID 83720

Gregory F. Zoeller  
*Attorney General of  
Indiana*  
IGC-South, Fifth Floor  
302 W. Washington St.  
Indianapolis, IN 46204

Derek Schmidt  
*Attorney General of  
Kansas*  
120 SW 10th Ave.  
Topeka, KS 66612

Jack Conway  
*Attorney General of  
Kentucky*  
Suite 118, State Capitol  
Frankfort, KY 40601

Bill Schuette  
*Attorney General of  
Michigan*  
P.O. Box 30212  
Lansing, MI 48909

Jim Hood  
*Attorney General of  
Mississippi*  
P.O. Box 220  
Jackson, MS 39205

Chris Koster  
*Attorney General of  
Missouri*  
Supreme Court Building  
207 West High St.  
Jefferson City, MO 65101

Jon Bruning  
*Attorney General of  
Nebraska*  
P.O. Box 98920  
Lincoln, NE 68509

E. Scott Pruitt  
*Attorney General of  
Oklahoma*  
313 N.E. 21st St.  
Oklahoma City, OK 73105

William H. Ryan, Jr.  
*Acting Attorney General of  
Pennsylvania*  
Strawberry Square  
Harrisburg, PA 17120

Alan Wilson  
*Attorney General of South  
Carolina*  
P.O. Box 11549  
Columbia, SC 29211

Marty J. Jackley  
*Attorney General of South  
Dakota*  
1302 E. Highway 14  
Pierre, SD 57501

Greg Abbott  
*Attorney General of Texas*  
P.O. Box 12548  
Austin, TX 78711

Robert M. McKenna  
*Attorney General of  
Washington*  
1125 Washington St. SE  
P.O. Box 40100  
Olympia, WA 98504

**QUESTIONS PRESENTED**

Since this Court decided *Van Orden v. Perry*, 545 U.S. 677 (2005), a three-way circuit split has developed over the appropriate test for evaluating whether a passive display with religious imagery violates the Establishment Clause. The Sixth and Tenth Circuits have held that the “endorsement test” applies. The Fourth and Eighth Circuits have held that Justice Breyer’s “legal judgment test” applies. And the Ninth Circuit has held that *both* tests apply.

The petition for certiorari presents three questions:

1. Whether the Court should resolve the 2-2-1 circuit split over the appropriate test for evaluating whether a passive display with religious imagery violates the Establishment Clause.

2. Whether this Court should set aside the “endorsement test”—as five Justices have urged over the past three decades—and adopt instead the “coercion test.”

3. Whether a memorial cross placed on state land by the Utah Highway Patrol Association, a private organization, to commemorate fallen state troopers is an unconstitutional establishment of religion.

**TABLE OF CONTENTS**

QUESTIONS PRESENTED..... i

TABLE OF AUTHORITIES ..... iii

INTEREST OF STATE *AMICI*..... 1

INTRODUCTION ..... 1

ARGUMENT ..... 4

STATE ROADSIDE MEMORIAL LAWS RAISE  
THE QUESTION OF WHETHER RELIGIOUS  
IMAGERY MAY BE INCLUDED TO HONOR THE  
DEAD. .... 4

CONCLUSION..... 11

**TABLE OF AUTHORITIES**

**Cases**

<i>Card v. City of Everett</i> , 520 F.3d 1009 (9th Cir. 2009).....	2, 6
<i>Cnty. of Allegheny v. ACLU</i> , 492 U.S. 573 (1989).....	3
<i>Green v. Haskell Cnty. Bd. of Com'rs</i> , 574 F.3d 1235 (10th Cir. 2009) .....	6
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971) .....	1, 3, 6
<i>McCreary Cnty v. ACLU</i> , 545 U.S. 844 (2005)....	1, 6
<i>Myers v. Loudoun Cnty. Pub. Schs.</i> , 418 F.3d 395 (4th Cir. 2005).....	2
<i>Salazar v. Buono</i> , 130 S.Ct. 1803 (2010).....	3, 11
<i>Trunk v. City of San Diego</i> , 629 F.3d 1099 (9th Cir. 2011).....	2
<i>Van Orden v. Perry</i> , 545 U.S. 677 (2005) . i,	1, 2, 3, 6

**Statutes**

43 TEX. ADMIN. CODE § 22.17 .....	7
605 ILL. COMP. STAT. ANN. § 125/15.....	7
605 ILL. COMP. STAT. ANN. § 125/20.....	8
625 ILL. COMP. STAT. ANN. 5/3-694 .....	5
ALA. CODE § 16-44A-53 .....	4

ALASKA STAT. ANN. § 19.25.260 .....	7, 9
ARIZ. REV. STAT. ANN. § 41-1363.....	5
ARK. CODE ANN. § 22-3-216.....	5
CAL. HEALTH & SAFETY CODE § 13081.....	4
CAL. STS. & HIGH. CODE ANN. § 101.10 .....	7, 9
COLO. REV. STAT. ANN. § 43-2-149 .....	7, 8
H.B. 228 (N.H. 2009 session).....	7, 10
LA. REV. STAT. ANN. § 25:527 .....	4
MISS. CODE ANN. § 45-3-53 .....	5
MO. REV. STAT. ANN. § 227.295.....	7
N.J. STAT. ANN. § 39:3-27.123.....	5
N.M. CODE R. § 18-20-7-8.....	7
N.M. STAT. ANN. § 30-15-7 .....	7, 9
TEX. TRANSP. CODE ANN. § 201.910 .....	5, 7
VA. CODE ANN. § 33.1-206.1 .....	7
W. VA. CODE ANN. § 17-20-1.....	7
W. VA. CODE ANN. § 17-20-2.....	8

**Other Authorities**

J. Michael Kennedy, <i>County Seal Has a Cross the ACLU Can't Bear</i> , L.A. TIMES, May 25, 2004.....	6
JOAN E. ALESSI, <i>DESCANSOS: THE SACRED LANDSCAPE OF NEW MEXICO</i> .....	9
Mike Chalmers, <i>States seek alternative to roadside memorials</i> , USA TODAY, June 4, 2010 .....	10
<i>Room for Debate: Should Roadside Memorials Be Banned?</i> , N.Y. TIMES, July 12, 2009.....	8
Sue Fox, <i>Facing Suit, County to Remove Seal's Cross</i> , L.A. TIMES, June 2, 2004.....	5
<i>Ten Commandments posting fails in Rapides Parish vote</i> , BATON ROUGE MORNING ADVOCATE, Apr. 13, 2011.....	6

**Rules**

SUP. CT. R. 32.2 .....	1
SUP. CT. R. 32.4 .....	1

**Constitutional Provisions**

U.S. CONST. amend. I.....	passim
---------------------------	--------



**INTEREST OF STATE AMICI**

Every state sponsors public memorials and monuments to honor persons, places, events, and institutions. And, like Utah, thirteen states have roadside memorial programs to honor the memory of deceased persons. State officials are thus commonly involved in the design of memorials and monuments, and often face the question of whether religious imagery may or may not be included consistent with the Establishment Clause. U.S. CONST. amend. I.<sup>1</sup> The twenty state *amici* therefore ask the Court to grant certiorari in this case.

**INTRODUCTION**

The Court should resolve a deep and persistent split over what standard governs the use of religious imagery in public displays. Circuits continue to struggle over what rule should be gleaned from the simultaneous decisions in *Van Orden v. Perry*, 545 U.S. 677 (2005), and *McCreary County v. ACLU*, 545 U.S. 844 (2005). *See* Pet. at 12-16 (describing split). This passage from a recent Ninth Circuit opinion illustrates the problem:

Because the Supreme Court issued *McCreary*, broadly espousing *Lemon* [*v. Kurtzman*, 403 U.S. 602 (1971)], contemporaneously with *Van Orden*,

---

<sup>1</sup> All counsel of record received timely notice of the *amici* states' intent to file this brief. SUP. CT. R. 32.2(a). No motion for leave to file this brief is necessary because it is presented on behalf of the *amici* states by their respective Attorneys General. SUP. CT. R. 32.4.

narrowly eschewing *Lemon*, we must read the latter as carving out an exception for certain Ten Commandments displays. We cannot say how narrow or broad the “exception” may ultimately be[.]

*Card v. City of Everett*, 520 F.3d 1009, 1018 (9th Cir. 2009). Just to be safe, the Ninth Circuit applies two different tests. See *Trunk v. City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011) (applying both *Lemon* and Justice Breyer’s “legal judgment” test from *Van Orden*). In another circuit, the Fourth, the stress of divining the governing standard splintered one three-judge panel three different ways.<sup>2</sup> The babel proceeds directly from this Court’s case law, and only the Court can silence it.

This case dramatizes how unpredictable interpretation of the Establishment Clause has become, and therefore how hard it is for state officials to know when their decisions risk violating it. Utah allows memorial crosses on public rights-of-way to honor fallen highway troopers. The memorials are designed and financed by a private organization, the Utah Highway Patrol Association, and Utah expressly declines to endorse the memorial design. See Pet. at 3-4 (describing

---

<sup>2</sup> See, e.g., *Myers v. Loudoun Cnty. Pub. Schs.*, 418 F.3d 395, 402 (4th Cir. 2005) (applying Justice Breyer’s “legal judgment” test to Pledge challenge); *id.* at 409 (Duncan, J., concurring) (relying on this Court’s “repeated assurances, albeit in dicta, that the Pledge does not violate the Establishment Clause”); *id.* at 410 (Motz, J., concurring) (relying on different dicta).

program). Yet the Tenth Circuit—while *agreeing* that the memorials have a secular purpose—ruled that their “primary effect” was to “advance religion.” Pet. at 5-6. The court reached this conclusion by applying a gloss on *Lemon* known as the “endorsement test,” a test which five Justices over the last three decades have expressly rejected. Pet. at 6, 19-20 (citing *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in judgment and dissenting in part, joined by Rehnquist, C.J., White and Scalia, JJ.); *Van Orden*, 545 U.S. at 692-93 (Thomas, J., concurring). Indeed, the Tenth Circuit added its own gloss on the endorsement test by presuming religious symbols on public property are unconstitutional unless they are somehow “secularize[d].” Pet. at 6. The panel was not deterred by the fact that, only last Term, a plurality of this Court explained 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. The Constitution does not oblige government to avoid any public acknowledgment of religion’s role in society.

*Salazar v. Buono*, 130 S.Ct. 1803, 1818 (2010) (op. of Kennedy, J., joined by Roberts, C.J., and Alito, J.).

States need to know when the Establishment Clause allows religious imagery in public displays and when it does not. Not only do states have numerous laws providing for monuments and memorials, but many states have roadside memorial programs similar to Utah's. As states administer these programs, they will often have to decide whether memorials may include religious symbols. States, of course, may exclude religious imagery for various legitimate reasons, but they should not be tempted to do so simply by fear of violating an imprecise and subjective constitutional standard. The Court should grant review in this case to clarify that standard and enable states to decide for themselves whether to include religious imagery in memorial programs such as the one at issue here.

#### **ARGUMENT**

#### **STATE ROADSIDE MEMORIAL LAWS RAISE THE QUESTION OF WHETHER RELIGIOUS IMAGERY MAY BE INCLUDED TO HONOR THE DEAD.**

State statute books teem with laws for memorializing persons, places, events, and institutions. *See, e.g.*, LA. REV. STAT. ANN. § 25:527 (2007) (authorizing Historical Preservation and Cultural Commission to “mark by proper monuments, tablets, or markers of proper design state landmarks and objects”).<sup>3</sup> Government

---

<sup>3</sup> *See also generally, e.g.*, ALA. CODE § 16-44A-53 (West 2011) (authorizing development of “master plan for the Alabama Veterans Living Legacy,” including the “National Veterans Shrine and Interpretive Gateway”); CAL. HEALTH & SAFETY CODE § 13081(a) (authorizing “construction of a

officials typically oversee the design and content of such memorials. *See, e.g.*, MISS. CODE ANN. § 45-3-53 (providing that markers commemorating fallen highway patrol officers “shall be designed by the Department of Public Safety”).<sup>4</sup> Given the subject matter of memorials, officials will often be required to gauge whether to include religious imagery in them. They will do so knowing their decisions could invite expensive challenges under the Establishment Clause.<sup>5</sup>

These widespread memorial laws are reason enough to grant review in this case. Perennially

---

memorial to California firefighters on the grounds of the State Capitol”); 625 ILL. COMP. STAT. ANN. 5/3-694(a) (authorizing issuance of “Chicago Police Memorial Foundation license plates”); TEX. TRANSP. CODE ANN. § 201.910 (authorizing memorial markers for certain peace officers killed in line of duty).

<sup>4</sup> *See also, e.g.*, ARIZ. REV. STAT. ANN. § 41-1363(B) (West 2011) (providing that proponents of a monument or memorial in a governmental mall “shall submit a concept” to the relevant department which “shall review ... and approve the final design, dimensions, location and maintenance requirements”); ARK. CODE ANN. § 22-3-216(c)(1) (establishing “Law Enforcement Officers’ Memorial Design Committee”); N.J. STAT. ANN. § 39:3-27.123(a) (providing that an “appropriate slogan and emblem” to commemorate fallen law enforcement officers are “to be designed by the Superintendent of State Police”).

<sup>5</sup> *See, e.g.*, Sue Fox, *Facing Suit, County to Remove Seal’s Cross*, L.A. TIMES, June 2, 2004, at B1 (reporting that “Los Angeles County supervisors ... ended an emotional debate over the symbolism of a tiny gold cross on the county seal by deciding to remove it rather than defend it against a threatened ACLU lawsuit”).

looming over state and local officials is the threat of litigation over memorial design.<sup>6</sup> The Court’s last attempt to impose order on this vexed area of law has not demonstrably succeeded. *See, e.g., Green v. Haskell Cnty. Bd. of Com’rs*, 574 F.3d 1235, 1244 (10th Cir. 2009) (observing that “confusion about whether and to what extent *Lemon* continues to control ... was exacerbated by” *McCreary County* and *Van Orden*). States would welcome knowing what standard governs the matter so that, at a minimum, lower courts could begin to fashion a coherent body of precedent to guide officials. *Cf. Card*, 520 F.3d 1009, 1016 (“Confounded by the ten individual opinions in the two cases, and perhaps inspired by the Biblical milieu, courts have described the current state of the law as both ‘Establishment Clause purgatory,’ and ‘Limbo.’”) (citations omitted).

There is also a more specific reason to grant review in this case. Like Utah, at least thirteen states provide official means for remembering the dead in roadside memorials—states such as Alaska, California, Colorado, Georgia, Florida, Illinois,

---

<sup>6</sup> *See, e.g., Ten Commandments posting fails in Rapides Parish vote*, BATON ROUGE MORNING ADVOCATE, Apr. 13, 2011, at 10A (noting police jurors’ comments that “I carry the Ten Commandments in my heart. But if I vote today to ratify, I have broken the law,” and “[w]e all love Jesus Christ. But when our attorney tells us to leave this alone, we need to respect that”); J. Michael Kennedy, *County Seal Has a Cross the ACLU Can’t Bear*, L.A. TIMES, May 25, 2004, at B3 (observing that the city of Redlands, California “capitulated when faced with a lawsuit and ordered the cross removed from every city logo”).

Minnesota, Missouri, New Mexico, Texas, Virginia, West Virginia and Wyoming.<sup>7</sup> State involvement in this area has resulted from the growth of private roadside memorials. For instance, in 2009 a *New York Times* forum on the subject—entitled *Room for Debate: Should Roadside Memorials Be Banned?*—was prefaced this way:

If you drive anywhere these days ... you've seen them, roadside memorials with crosses and flowers to honor the victim of a car accident. [...] These homemade shrines, however, are not without controversy. Why do people feel a need to build them? Are they a distraction or a warning? Should restrictions be placed on them?

---

<sup>7</sup> See ALASKA STAT. ANN. § 19.25.260 (West 2011); CAL. STS. & HIGH. CODE ANN. § 101.10; COLO. REV. STAT. ANN. § 43-2-149; 605 ILL. COMP. STAT. ANN. § 125/15; MO. REV. STAT. ANN. § 227.295; N.M. STAT. ANN. § 30-15-7; N.M. CODE R. § 18-20-7-8; TEX. TRANSP. CODE ANN. § 201.910; 43 TEX. ADMIN. CODE § 22.17; VA. CODE ANN. § 33.1-206.1; W. VA. CODE ANN. § 17-20-1; see also [www.dot.state.wy.us/wydot/news\\_info/roadside\\_memorials](http://www.dot.state.wy.us/wydot/news_info/roadside_memorials) (last visited May 5, 2011) (Wyoming program); [www.dot.state.ga.us/doingbusiness/PoliciesManuals/pap/Documents/Policies/6160-9.pdf](http://www.dot.state.ga.us/doingbusiness/PoliciesManuals/pap/Documents/Policies/6160-9.pdf) (last visited May 5, 2011) (Georgia); [www.dot.state.mn.us/maint/files/mnt\\_bull/MEMORIAL%20MARKER%20BULLETIN%206-9-04.pdf](http://www.dot.state.mn.us/maint/files/mnt_bull/MEMORIAL%20MARKER%20BULLETIN%206-9-04.pdf) (last visited May 6, 2011) (Minnesota); <http://floridaplates.com/memorial/index.htm> (last visited May 6, 2011) (Florida). In New Hampshire, roadside memorial legislation was introduced in 2009 but was not enacted. See H.B. 228 (2009 session). Wisconsin prohibits memorials, but allows adoption of highways in the deceased's name. See [www.dot.wisconsin.gov/business/rules/memorials.htm](http://www.dot.wisconsin.gov/business/rules/memorials.htm) (last visited May 6, 2011).

N.Y. TIMES, July 12, 2009.<sup>8</sup> States have acted to address various concerns raised by private memorials, such as highway safety.<sup>9</sup> But the question commonly arises whether memorials may include religious imagery. Indeed, one of the participants in the *New York Times* debate—the only lawyer, incidentally—opined bluntly that because roadside memorials “invariably include Christian crosses and other religious symbols,” they “violate[] the constitutional principle of separation of church and state.” N.Y. TIMES, *supra*.

States take various approaches to the sensitive matter of memorial design. Many states control the design of memorials, while some allow private input. *Compare, e.g.*, 605 ILL. COMP. STAT. ANN. § 125/20(a) (prescribing design and content of memorial marker), *with* W. VA. CODE ANN. § 17-20-2(a)(2) (allowing “[d]ecorations, flowers or other memorial ornaments or tributes [to] be placed on the right-of-way by family members”). Regardless of approach, however, states are closely involved in determining what images and language appear in memorials. *See, e.g.*, COLO. REV. STAT. ANN. § 43-2-

---

<sup>8</sup> <http://roomfordebate.blogs.nytimes.com/2009/07/12/should-roadside-memorials-be-banned/> (last visited May 16, 2011).

<sup>9</sup> For instance, the *Athens Banner-Herald* observed that “[t]he Georgia Department of Transportation has struck the perfect balance between sensitivity and safety with the introduction earlier this month of a formal plan for memorializing those who die on state and federal roadways.” [http://onlineathens.com/stories/021011/opi\\_83469070.shtml](http://onlineathens.com/stories/021011/opi_83469070.shtml) (last visited May 16, 2011).



149((4)(b) (authorizing county commissioners to suggest “an alternative design” for the memorial).

These programs pointedly raise the question of whether a memorial may include religious imagery. Where private persons are permitted to contribute to a memorial’s design, some will understandably want symbols or language from their own religious traditions. *See, e.g.,* ALASKA STAT. ANN. § 19.25.260(g) (allowing memorial to include “ornamentation commonly used at funerals or at gravesides as a tribute to a decedent”). One state—New Mexico—honors this impulse by protecting private memorials known as *descansos*, which are traditional roadside shrines often taking the form of a cross. *See* N.M. STAT. ANN. § 30-15-7(A); JOAN E. ALESSI, *DESCANSOS: THE SACRED LANDSCAPE OF NEW MEXICO* 22 (Fresco Fine Art Pub. 2007).<sup>10</sup>

When a state itself designs a memorial, the dilemma of religious imagery does not disappear; it deepens. Now government assumes responsibility for deciding what symbols are permitted. One state may opt for memorials with minimal text and imagery. *See, e.g.,* CAL. STS. & HIGH. CODE ANN. § 101.10(a)(1) (prescribing “Please Don’t Drink and Drive,” followed by: “In Memory of (victim’s name)”). Another, however, may want to include images indicative of death and loss. For instance,

---

<sup>10</sup> *Descansos* were the subject of a recent, well-received documentary film, *Resting Places*, narrated by Liam Neeson. *See* <http://webpages.charter.net/dnance/whatever/kc.htm> (last visited May 14, 2011) (describing documentary film on the “global phenomenon” of roadside crosses and the “[o]pponents [who] want it stopped”).

Wyoming sponsored a contest for schoolchildren and from entries selected two symbols for its memorial program—a broken heart and a dove—explaining that “the heart symbolizes grief and sorrow, while the dove flying upward suggests hope, peace, and healing.”<sup>11</sup>

In approaching these matters of death and remembrance, states need to know how much discretion the First Amendment affords them. Some states may decide to exclude religious imagery from official memorials,<sup>12</sup> while others may permit it in some sensible way. But a state’s policy should not be influenced by confusion about what the Establishment Clause requires.

When states, like Utah, allow religious imagery in memorials, they do so simply to honor the traditions of those who remember deceased loved ones. The Establishment Clause does not require states to marginalize this common human impulse.

---

<sup>11</sup> See [www.dot.state.wy.us/webdav/site/wydot/shared/Public%20Affairs/Roadside%20Memorial%20Program%20Brochure.pdf](http://www.dot.state.wy.us/webdav/site/wydot/shared/Public%20Affairs/Roadside%20Memorial%20Program%20Brochure.pdf) (last visited May 5, 2011). Wisconsin disallows memorials but has sometimes “worked with grieving families to place plantings at a rest area near a crash scene.” See [www.dot.wisconsin.gov/business/rules/memorials.htm](http://www.dot.wisconsin.gov/business/rules/memorials.htm) (last visited May 14, 2011). Similarly, Delaware provides an alternative “Highway Memorial Garden” to honor crash victims. See Mike Chalmers, *States seek alternative to roadside memorials*, USA TODAY, June 4, 2010, [http://www.usatoday.com/news/nation/2010-06-04-roadside-memorials-alternatives\\_N.htm#](http://www.usatoday.com/news/nation/2010-06-04-roadside-memorials-alternatives_N.htm#) (last visited May 14, 2011).

<sup>12</sup> For instance, a 2009 New Hampshire bill would have required memorials to be “nondenominational in appearance.” See H.B. 228 (2009 session).

In other words, states may acknowledge some citizens' religious sensibilities without "establishing" a religion. As three Justices recently observed, "[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*, 130 S.Ct. at 1818 (op. of Kennedy, J., joined by Roberts, C.J., and Alito, J.). The Court should grant review to confirm that commonsense conclusion and clarify the constitutional standards underlying it.

#### CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

JAMES D. "BUDDY" CALDWELL  
Louisiana Attorney General

S. KYLE DUNCAN  
Appellate Chief  
*Counsel of Record*

ROSS W. BERGETHON  
Assistant Attorney General  
LOUISIANA DEPARTMENT OF JUSTICE  
Post Office Box 94005  
Baton Rouge, LA 70804  
(225) 326-6716

Counsel for State *Amici Curiae*

May 23, 2011