

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

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

Plaintiffs/Appellants,
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
& Management, Department of Administrative Services,

Defendants/Appellees,

UTAH HIGHWAY PATROL ASSOCIATION,

Defendant/Intervener/Appellee.

**APPELLANTS' RESPONSE TO
PETITION FOR REHEARING *EN BANC* BY
UTAH STATE DEFENDANTS**

AN APPEAL FROM A GRANT OF SUMMARY JUDGMENT
DISMISSING PLAINTIFFS' COMPLAINT
United States District Court for the District of Utah
Central Division
Case No. 02:05-CV-00994 DS
The Hon. David Sam, Judge Presiding

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Appellants, AMERICAN ATHEISTS, INC., a Texas, non-profit corporation, R.
ANDREWS, S. CLARK, and M. RIVERS, by and through counsel, Brian M. Barnard,
cooperating attorney for UTAH CIVIL RIGHTS & LIBERTIES FOUNDATION, INC.
here respond to the Petition for Rehearing *en banc* filed by the defendants / appellees

COLONEL SCOTT T. DUNCAN, JOHN NJORD, D'ARCY PIGNANELLI and KEITH STEPAN (“State Defendants” or “Utah”) as follows:

I. RULE 40, FEDERAL RULES OF APPELLATE PROCEDURE

In seeking a rehearing, the State Defendants broadly assert the panel decision conflicts with Green v. Haskell County Board of Commissioners, 568 F.3d 784 (10th Cir. 2009)¹, Weinbaum v. City of Las Cruces, 541 F.3d 1017 (10th Cir. 2008), and O'Connor v. Washburn University, 416 F.3d 1216 (10th Cir. 2005).¹ State Defendants’ Petition for Rehearing (“Utah’s Rehear Petition”) 1-2.

Utah notes the panel decision discusses Weinbaum but then asserts that the panel did not “follow that analytic model or . . . view the effect through the eyes of the knowledgeable, objective observer.” Utah’s Rehear Petition 4. Utah faults the hearing panel for its starting point in the analysis – the fact that a Latin cross is “unequivocally a symbol of the Christian faith.” Slip Op. at 25; id. Utah then simply repeats arguments previously made. State Appellee’s Brief (pp. 12 - 27). All those arguments were appropriately considered by the hearing panel. Slip Op. at 22-35.

¹ The State’s Petition provides little insight as to how the panel failed to properly apply Green or O’Connor.

A rehearing is not appropriate in this case where the panel has not misapprehended the facts, a party's position, nor the controlling law. Fed.R.App.Pro. 40(a)(2)²; see Van Skiver v. United States, 952 F.2d 1241, 1243 (10th Cir. 1991). A petition for rehearing which “discloses no issues the panel has overlooked or misconstrued in its order and judgment” and “is essentially a reiteration of arguments already advanced in the briefs . . . is neither helpful nor persuasive.” Westcot Corp. v. Edo Corp., 857 F.2d 1387, 1387-1388 (10th Cir. 1988). A petition for rehearing is to direct the court's attention to some material matter of law or fact which it has overlooked in deciding a case, and which, had it been given consideration, would probably have brought about a different result. National Labor Relations Board v. Brown & Root, Inc., 206 F.2d 73, 74 (8th Cir.1953). Utah points to nowhere the panel decision misapprehended the facts nor the law. Utah simply reargues its case in its Petition. This is an abuse of the privilege of making such a petition. Anderson v. Knox, 300 F.2d 296, 297 (9th Cir. 1962).

² Fed.R.App.Pro. 40(a)(2): “Contents. The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended . . .”

10th Cir. R. 40.1(A): “Rehearing will be granted only if a significant issue has been overlooked or misconstrued by the court.”

II. THE EFFECT PRONG UNDER THE LEMON TEST

In the Lemon v. Kurtzman, 403 U.S. 602 (1971), effect prong analysis, pertinent factors to consider include:

- the display's purpose;
- the display's permanence;
- the religious significance of the symbol or display;
- the historical background of the symbol.
- the historical background of the display independent of the religious content;
- the size of the display;
- the visibility of the display;
- the prominence of the location; and,
- the neutralizing effect of any other nearby displays.

See McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005); Van Orden v. Perry, 545 U.S. 677 (2005). The panel considered the above factors. Slip Op. at 22-35. As viewed by a reasonable objective observer, these factors weighed heavily against the Utah Highway Patrol Association ("UHPA") crosses on state property and/or with the imprimatur of the Utah Highway Patrol ("UHP") logo. Id. The purpose, history and context of the memorials do not negate the strong religious message and effect of the monumental Roman crosses. Id.

A. **The Panel Properly Considered *Purpose* under the *Effect* Prong of Lemon**

The State of Utah argues that in applying the effect prong of the Lemon analysis, the Panel failed to consider that Lemon's reasonable observer would have been aware that

the State and the UHPA have secular purposes for the memorials. Utah’s Rehear Petition 6. Purpose is *one* sub-factor to be considered within the effect prong of the Lemon analysis. It is distinct from the main government *purpose* prong of the Lemon analysis. As the panel noted, the Defendants’ secular purpose “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.” Slip. Op. at 24. Purpose, under the effects prong, “is merely one element of the larger factual and historical context that [the court must] consider [under the effects prong of Lemon]” and given this larger context, the panel held the UHPA memorials to violate the Establishment Clause. Slip Op. at 24, 35. Moreover, the UHPA has acknowledged that its purpose in having the official UHP logo on the memorial crosses is to show a relationship between the crosses, the government and the deceased trooper. Applt. App. 421, ¶¶ 19-20. The panel properly considered purpose as a factor within the effect prong of its Lemon analysis. Slip Op. at 23, *et seq.*

B. Context – Utah’s Exclusive Grant to the UHPA

Utah does not allow groups or individuals other than UHPA to erect road side memorials of any size.³ The Utah Department of Transportation (“UDOT”) prohibits all private memorials on the right-of-way of all Utah highways. Applt. App. 2272; *see*

³ Thus, in Utah, there are no *descansos*, the small traditional roadside markers of Hispanic origin.

Applt. App. 2281; Applt. App. 2339; Ut. Code Ann. § 72-7-102⁴ & 104 (1953 as amended); Policy for Roadside Memorials, UDOT 06C-10 (Eff. Date 05/26/2005) (“The Department will promptly remove and dispose of any private memorials.”). Those statutes and rules cause an observer to conclude the crosses are government expression or government endorsed expression.

No sign nor explanation on or near the crosses announces that they were erected by a private group or that they are private expression and not expression of the State or of the UHP nor are any other groups or persons permitted to erect memorials within the State right-of-way. Applt. App. 630, ¶ 19; Applt. App. 678, ¶ 19.

C. The Roman Cross Traditionally Is Used to Memorialize *Christian* Death

Without citation to authority, State Defendants broadly assert “[t]he cross is also firmly recognized as a symbol of death or a place of burial.” Applt. App. 191.⁵ However, the Roman cross is the foremost and virtually exclusive symbol of Christianity. Applt. App. 68. That symbolism is not negated when some people see such a cross and think merely of death; nor it is negated because the shape may have been used for other purposes. In hundreds of years of religious iconography, the Roman cross has

⁴ Ut. Code Ann. § 72-7-102(2)(1953 as amended): “. . . [A] person may not . . . (b) place, construct, or maintain any . . . structure or object of any kind or character within the right-of-way.”

⁵ Similarly, State Defendants cite no authority for their general claim “a cross is internationally recognized as a memorial for a person’s death.” Applt. App. 192.

represented the death of Jesus Christ and the Christian faith. Applt. App. 717-718, ¶¶ 6-7. It thus has traditionally represented and continues to represent the place of burial of a *Christian*. Id.; John Gary Brown, *Soul in Stone: Cemetery Art From America's Heartland* 20 (Univ. Press of Kan. 1994) (Roman cross as a grave marker instantaneously conveys the religious affiliation of the deceased).

The panel decision correctly noted there was “no evidence in the record that the cross has been universally embraced . . . as a memorial for a non-Christian’s death.” Slip Op. at 29. That was in response to unsupported claims by Appellees that the cross has been universally embraced as a memorial for death, including deaths of non-Christians. The panel decision did not reject Appellees’ position as to secular use of a cross as a memorial or to signify death, but noted that the cross represented the death of a *Christian*. Slip Op. at 29 (emphasis added).

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. Slip Op. at 29-30. While white crosses are a time-honored medium to memorialize Christian soldiers, these crosses convey the religious affiliation of the deceased. Id. The graves of Jewish soldiers in United States Military Cemeteries located outside the United States are marked by the Star of David and *not* by Roman crosses. Id. Moreover, the military provides soldiers buried in the United States and their families with a large number of different religious symbols that they may use on government-issued headstones or markers to reflect to the

religious orientation of the deceased⁶. Id.

Thus, while the cross may be a common symbol used in markers and memorials, as the hearing panel specifically noted,

. . . 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. 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.

Slip Op. at 29. The Roman cross is unmistakably a religious symbol and traditionally has been used as “a *Christian* symbol of death” Slip Op. at 29 (emphasis added). The UHPA's acknowledgment that it would allow the families of non-Christian troopers to select another religious symbol makes it clear that even the UHPA recognizes that the cross has not been secularized and conveys an unmistakably religious message in the context of the memorials.⁷

D. The UHPA Crosses Stand Alone

Whether the government violates the Establishment Clause depends in large part on the display's particular physical setting. Lynch v. Donnelly, 465 U.S. 668, 671,

⁶ A small Roman cross may be etched on a government issued veteran's tombstones in recognition of honorable service to one's country. Applt. App. 381; Applt. App. 931, *et seq.* Thirty-eight (38) different religious symbols are authorized by the Veterans' Administration for the tombstones. Id.; Applt. App. 1951-1952, ¶¶ 21, 26. Thus, for those government issued grave markers, the Roman cross is not the universal nor exclusive symbol to recognize service to one's country, etc.

⁷ See Applt. App. 2970-2971, 52:22 - 53:4;53:10-11.

681-82, 685 (1984); Van Orden, 545 U.S. 677, 701 (Breyer, J., concurring in the judgment).

In applying this "effects" test, [the Court] must consider the " 'particular physical setting' " of the challenged action. Foremaster⁸, 882 F.2d at 1491 (*quoting* Allegheny⁹, 492 U.S. at 597, 109 S.Ct. at 3103).

Robinson v. City of Edmond, 68 F.3d 1226, 1229-1230 (10th Cir. 1995). The thirteen (13)

UHPA memorial crosses stand alone despite the facts that:

- they are erected throughout Utah as part of a statewide program;
- they have writing on them along with a plaque containing biographical information and the UHP logo; and,
- two (2) crosses stand near each other at certain locations.

There are no other similar displays near any of the crosses; they stand alone. *See* Slip Op. at 26, 36; Applt. App. 2996, ¶ 34; Applt. App. 676, ¶ 8. Nothing near by creates context nor dilutes the poignant meaning of the Latin crosses. Slip Op. at 22, *et seq.*

No authority supports a claim that merely adding a trooper's name, rank, badge number, year of death, a small plaque with a brief biography and the official UHP logo makes the Roman cross no longer a poignant religious symbol. Such additions do not create "context," *i.e.*, physical surroundings, in which the cross is displayed.

⁸ Foremaster v. City of St George, 882 F.2d 1485 (10th Cir. 1989)

⁹ County of Allegheny v. ACLU, 492 U.S. 573 (1989)

E. The Religious Intent of the UHPA Crosses

UHPA had and continues to have strong religious intent when it chose and now continues to use the cross as its memorial. For the UHPA and the troopers' families, the cross conveys the religious affiliation of the trooper. For the UHPA, the cross is not a secular generic message of death.

UHPA acknowledges that their Roman crosses memorials are not "purely secular" because "purely secular" memorials would not convey the message of honoring and memorializing fallen UHP troopers. Applt. App. 371, n.10; Applt. App. 969, n.16.

UHPA acknowledges that the Roman crosses are of religious origins and are a "symbol of faith." Applt. App. 971; *see* Applt. App. 980.

For UHPA the memorial crosses are religious symbols. UHPA would allow the family of the deceased UHP trooper to chose religious symbols other than the cross as the roadside memorial. "Because [the UHPA] exist[s] to serve family members of highway patrolmen, the UHPA would provide another memorial symbol if requested by the family." Applt. App. at 1869; Slip Op. at 7.

. . . if . . . the UHPA . . . were requested by a highway patrol member's family to erect . . . a Star of David or place the Star of David on the cross or put up a different memorial . . . we would accommodate that request.

Applt. App. 2970-2971, 52:22 - 53:4; 53:10-11.

The religious preference of the deceased trooper's family determines the UHPA memorial to be erected. The UHPA crosses are religious symbols, not generic symbols of death.

III. THE PANEL CORRECTLY APPLIED PLEASANT GROVE IN DETERMINING THAT THE MEMORIALS ARE GOVERNMENT SPEECH

Both the UHPA and the State of Utah argue that the memorial crosses should not be viewed as government speech despite the Supreme Court's decision in *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125 (2009), which held that privately financed and donated monuments that government accepts and displays on government land will almost always constitute government speech. *Pleasant Grove*, 129 S. Ct. at 1133. Utah argues that *Pleasant Grove* is distinguishable because "[u]nlike *Pleasant Grove*, the private owners of the monuments in this case retained ownership and control over the crosses." Utah's Rehear Petition 12. However, UHPA's retained ownership is not determinative under either *Pleasant Grove* or Supreme Court Establishment Clause jurisprudence.¹⁰ The significant factor is that the crosses are permanently erected on

¹⁰ Ownership is not determinative in the Establishment Clause analysis. Rather, the significant question is whether government, by accepting or allowing the display or monument, is conveying a message of endorsement. For example, in *County of Allegheny v. ACLU*, 492 U.S. 573, 600-01 (1989), the Supreme Court held that a nativity scene (creche) displayed in the county courthouse violated the Establishment Clause despite the fact that the nativity was owned by a Roman Catholic organization and not the government. The Court said:

The fact that the creche bears a sign disclosing its ownership by a Roman Catholic organization does not alter this conclusion. On the contrary, the sign simply demonstrates that the government is endorsing the religious message of that organization, rather than communicating a message of its own. . . . [T]he very concept of "endorsement" conveys the sense of promoting someone else's message. Thus, by prohibiting government endorsement of religion, the Establishment Clause prohibits precisely what occurred here: the government's lending its support to the communication of a religious organization's religious message.

Id.

government land with the permission of the State. To state the obvious, a permanent monument differs greatly from temporary picketers or hours long demonstrations in public parks or on the public right of way. The Court in Pleasant Grove noted,

It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated. And because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely - and reasonably - interpret them as conveying some message on the property owner's behalf. In this context, there is little chance that observers will fail to appreciate the identity of the speaker.

Pleasant Grove, 129 S.Ct at 1133. Moreover, the State has “effectively controlled” the messages sent by the monuments . . . by exercising “final approval authority” over their installation, a fact which the Pleasant Grove Court found to be highly significant.

Pleasant Grove, 129 S. Ct. at 1134 (citations omitted). The mere fact that UHPA has retained ownership does not prevent the crosses from being expression on behalf of Utah which allowed their erection on government land, approved their content, allowed the use of the Utah Highway Patrol logo and excludes all other memorials of death from the State right-of-way.

Utah asserts “[t]he panel also failed to consider whether the private monuments in question remained the private speech of their owners.” Utah’s Rehear Petition, 13. However, the Supreme Court specifically cautioned against and rejected this sort of overly simplistic *either/or* view in Pleasant Grove. See Pleasant Grove, 129 S. Ct. at 1135. A permanent monument erected on government land need not be either purely

government speech or entirely the speech of the donor or owner. Such a view “fundamentally misunderstands the way monuments convey meaning . . . Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways.” Pleasant Grove, 129 S. Ct. at 1135. “[I]t frequently is not possible to identify a single ‘message’ that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor.” Id. at 1136. In fact, the Roman crosses in this case function simultaneously as the speech of the UHPA and as the speech of the State of Utah. Nevertheless, there is a “near certainty that observers will associate permanent displays with the governmental property owner” and observers will thus associate the meaning conveyed by the crosses with the State. Pleasant Grove, 129 S.Ct. at 1139 (Stevens J., concurring). Thus, for Establishment Clause purposes the question is not which defendant intends to speak through the crosses but rather “whether these memorial crosses would have an impermissible effect on the reasonable observer.” Slip Op. at 24. Here, for the reasons articulated in the panel decision, regardless of who owns them, the cross memorials convey to a reasonable observer that the state of Utah is endorsing Christianity. Slip Op. at 35.

CONCLUSION

The hearing panel properly considered the facts and issues before the Court and applied the proper legal analysis. The State Defendants seek rehearing, yet present no substantial mistakes of law. Instead, Utah simply presents again the arguments already considered by the hearing panel. This is not an appropriate use of a petition for rehearing and Utah's petition should therefore be denied.

Utah's suggestion that the panel failed to appropriately apply the Lemon effects analysis is without merit. The panel analyzed the relevant factors, including Defendants' purpose for the memorials, and correctly concluded that based on the totality of relevant factors, the UHPA memorials convey an impermissible message of government endorsement of Christianity to the reasonable observer. Finally, Utah's reliance on Pleasant Grove is misplaced because ownership of the crosses is not determinative in Establishment Clause effects analysis under Lemon and Allegheny.

For the foregoing reasons, Utah's Petition for Rehearing *En Banc* should be denied.

Respectfully submitted this 14th day of October 2010.

UTAH CIVIL RIGHTS & LIBERTIES
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CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing **APPELLANT'S RESPONSE TO PETITION FOR REHEARING *EN BANC* BY UTAH STATE DEFENDANTS** along with an electronic copy of the document sent via email.

All required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and the digital submissions have been scanned for viruses with Microsoft Security Essentials 1.91.1675.0 updated 10/12/10.

The foregoing was mailed to:

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