

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

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**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.

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**APPELLANTS' RESPONSE TO  
PETITION FOR REHEARING *EN BANC* BY  
UTAH HIGHWAY PATROL ASSOCIATION**

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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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**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES..... ii

APPELLANTS’ RESPONSE TO PETITION FOR REHEARING *EN BANC* BY  
UTAH HIGHWAY PATROL ASSOCIATION..... 1

I. UHPA’S STATEMENT OF FACTS..... 2

II. THE PANEL PROPERLY APPLIED WEINBAUM V. LAS CRUCES... 2

III. MONUMENTAL UNADORNED CROSSES STANDING ALONE  
ON GOVERNMENT PROPERTY VIOLATE THE  
ESTABLISHMENT CLAUSE. .... 5

IV. THE PANEL DECISION IS CONSISTENT WITH FRIEDMAN V.  
BOARD OF COUNTY COMMISSIONERS OF BERNALILLO  
COUNTY..... 7

V. THE PANEL DECISION IS CONSISTENT WITH  
VAN ORDEN V. PERRY..... 9

VI. OWNERSHIP OF CROSSES IS IRRELEVANT TO THE  
ESTABLISHMENT CLAUSE ANALYSIS..... 10

VII. ROMAN CROSSES DIFFER FROM THE TEN  
COMMANDMENTS. .... 12

VIII. SALAZAR V. BUONO..... 13

CONCLUSION. .... 15

CERTIFICATE OF MAILING. .... 16

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

County of Allegheny v. ACLU, 492 U.S. 573 (1989). . . . . 10

Friedman v. Board of County Commissioners of Bernalillo County,  
781 F.2d 777 (10<sup>th</sup> Cir. 1985). . . . . 7, 8, 9

Green v. Haskell County Board of Commissioners, 568 F.3d 784 (10<sup>th</sup> Cir. 2009). . . . . 7

Lemon v. Kurtzman, 403 U.S. 602 (1971). . . . . 5, 7, 9

Lynch v. Donnelly, 465 U.S. 668 (1984).. . . . 3

McCreary County v. ACLU of Kentucky , 545 U.S. 844 (2005). . . . . 5, 12, 13

O’Connor v. Washburn University, 416 F.3d 1216 (10<sup>th</sup> Cir. 2005).. . . . 3

Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009). . . . . 10, 11

Robinson v. City of Edmond, 68 F.3d 1226 (10<sup>th</sup> Cir. 1995).. . . . 3

Salazar v. Buono, 130 S. Ct. 1803 (2010). . . . . 13, 14, 15

Separation of Church and State Comm. v. Eugene, 93 F.3d 617 (C.A.9 1996). . . . . 15

Shroff v. Spellman, 604 F.3d 1179 (10<sup>th</sup> Cir. 2010). . . . . 2

Van Orden v. Perry, 545 U.S. 677 (2005). . . . . 3, 5, 7, 9, 12, 13

Weinbaum v. City of Las Cruces, 541 F.3d 1017 (10<sup>th</sup> Cir. 2008). . . . . 2, 3, 4, 6, 7, 9

**FEDERAL STATUTES AND RULES**

Fed. R. App. Pro. 40(a)(2). . . . . 2

**Case No. 08-4061**

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**APPELLANTS' RESPONSE TO  
PETITION FOR REHEARING *EN BANC* BY  
UTAH HIGHWAY PATROL ASSOCIATION**

---

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 defendant / intervener / appellee **UTAH HIGHWAY PATROL ASSOCIATION** ("UHPA") as follows:

## **I. UHPA’S STATEMENT OF FACTS**

UHPA’s Petition for Rehearing includes a statement of facts framed to favor its position. UHPA Petition for Rehearing (“UHPA’s Rehear Petition”) at 2-5. Attempting to add new facts or rearguing the facts already considered by the panel is not appropriate at this time. The panel decision properly sets out the undisputed facts of the case, based upon the extensive record produced below upon mutual motions for summary judgment. Slip Op. at 5-8; 22-35. The panel decision properly construed all facts in favor of the State Defendants (“Utah”) and UHPA as the non-moving parties. Shroff v. Spellman, 604 F.3d 1179, 1187 (10<sup>th</sup> Cir. 2010).

UHPA’s Petition for Rehearing fails to “state with particularity . . . fact[s] that the petitioner believes the court has overlooked or misapprehended” instead, UHPA simply reframes and recharacterizes the facts previously presented with no assertion that the panel somehow overlooked or misapprehended them. UHPA’s Rehear Petition at 2-5. UHPA’s petition fails to comply with Rule 40. Fed.R.App.Pro. 40(a)(2).

## **II. THE PANEL PROPERLY APPLIED WEINBAUM v. LAS CRUCES**

The panel decision properly applied Weinbaum v. City of Las Cruces, 541 F.3d 1017 (10<sup>th</sup> Cir. 2008). As required by Supreme Court and Tenth Circuit jurisprudence, the panel looked at the UHPA crosses along with their purpose, history and context. Each Establishment Clause case is unique.

UHPA acknowledges that the panel used the same legal analysis as used in Weinbaum. UHPA's Rehear Petition 5. Applying the law to the specific facts of this case, the panel decision found an Establishment Clause violation and the Weinbaum court found none. The context in Las Cruces *versus* the context in Utah were different. Different contexts meant different results. The result in the instant case is not a result of some particular point of law or fact "overlooked or misapprehended." Rule 40, Fed.R.App.Pro.

Whether the government violates the Establishment Clause depends in large part on the display's particular physical setting. Van Orden v. Perry, 545 U.S. 677, 701 (2005) (Breyer, J., concurring in the judgment); Lynch v. Donnelly, 465 U.S. 668, 671, 681-82, 685 (1984); O'Connor v. Washburn University, 416 F.3d 1216, 1228 (10<sup>th</sup> Cir. 2005); Robinson v. City of Edmond, 68 F.3d 1226, 1229-1230 (10<sup>th</sup> Cir. 1995).

Weinbaum involved a challenge to the name of the city derived from historical events 250 - 300 years previous. Weinbaum, 541 F.3d at 1035. The unique history of that city lead to a geographic and political nomenclature separate and distinct from any original religious significance. The city drew its very name from the historic display of crosses. The cross symbol was used by many private entities to identify themselves with the city. Id. at 1033-34. The city logo pictograph now represents the city and not the historical events or any related religious significance. Id. at 1035. The crosses on the city logo were long removed in time and by common usage from their original religious significance.

Beginning as did Weinbaum, the panel recognized that the Latin cross “is unequivocally a symbol of the Christian faith.” Slip Op. at 25.

The Christian or Latin cross - a cross with three equal arms and a longer foot - reminds Christians of Christ's sacrifice for His people. *See* [Weinbaum v. City of Las Cruces, 465 F.Supp.2d [1164 (D.N.M.2006)] at 1170; *see also* 11 Encyclopedia of Religion 7640 (Lindsay Jones, ed., 2005); *id.* at 7688. Accordingly, it is unequivocally a symbol of the Christian faith. FN2. . . .

FN2. But not exclusively so; the cross is an oft-used symbol in other cultures and religions as well. *See* 5 Encyclopedia of Religion at 3434; 14 Encyclopedia of Religion at 9339 (discussing cross as symbol of tree of life).

Weinbaum v. City of Las Cruces, N.M., 541 F.3d 1017, 1022-1023 (10<sup>th</sup> Cir. 2008). That unequivocal and virtually universal symbol is the most important and primary factor when analyzing the effect of the UHPA memorials through the eyes of the objective, knowledgeable, reasonable observer. The large Roman cross is the UHPA memorial. In comparison, the written words and the UHP logo are secondary to the cross and its message.

The reasonable observer presented with the UHPA crosses would confront and consider their size. “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.” Slip Op. at 32. The panel decision appropriately considered the size of the UHPA crosses in reviewing context. The crosses are much larger than necessary to

simply be seen by passing motorists. Slip Op. at 32; 32, n.14. Their substantial size can not be disregarded.<sup>1</sup>

The panel did not “broadly reject[] . . . any secular use of the cross to signify death” as the UHPA suggests nor did the panel determine that a Latin cross is solely, always and only a religious symbol<sup>2</sup> or that its use or display is always prohibited to government. UHPA’s Rehear Petition 7; Slip Op. 20, n.9. Rather, the panel held that while a Latin cross may, in some contexts, have a non-religious meaning or effect, the UHPA memorial crosses do not. Slip Op. at 30 (“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.”) (emphasis added).

### **III. MONUMENTAL UNADORNED CROSSES STANDING ALONE ON GOVERNMENT PROPERTY VIOLATE THE ESTABLISHMENT CLAUSE**

The UHPA concedes that monumental size crosses standing alone on government property would violate the Establishment Clause. The panel decision so noted.

. . . there is little doubt that Utah would violate the Establishment Clause if it allowed a private group to place a permanent unadorned

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<sup>1</sup> The Supreme Court has looked to the size of the display when applying the Lemon effects prong analysis. *See* *McCreary County, Ky. v. A.C.L.U.*, 545 U.S. 844, 851, 854, 855 (2005); *Van Orden v. Perry*, 545 U.S. 677, 681, 700 (2005).

<sup>2</sup> The panel decision acknowledged that “We agree that a reasonable observer would recognize these memorial crosses as symbols of death.” Slip Op. at 29. However, the panel noted “it is a Christian symbol of death that signifies or memorializes the death of a Christian.” Id.

twelve-foot cross on public property without any contextual or historical elements that served to secularize the message conveyed by such a display.

Slip Op. at 25-26. Thus, the panel looked for secularizing context and surrounding displays in considering the UHPA crosses. Slip Op. at 25-35.

The UHPA states “[h]ad there been no other context, the crosses of Las Cruces would likely have fallen.” UHPA Rehear Petition 10, *citing* Weinbaum v. Las Cruces Public Schools, 465 F.Supp.2d 1116 (D.N.M., 2006). The reference is to the monumental sculpture on the side of a school district owned sports complex. *Id.*, 1124. That sculpture’s predominant feature is an ~ 8 foot tall cross. However, the context of that cross meant its governmental display did not violate the Establishment Clause. The context was first and foremost the city’s name together with the other elements of the sculpture, the stylized nature of the crosses, words within the sculpture, and its presence on a sports complex with plaques explaining the sports related theme. *Id.*, 1143-1151. All those factors created a context that made clear the sculpture’s non-religious nature.

Under Weinbaum and its predecessor cases, the appropriate analysis is to examine the unique circumstances of each case, especially context of the religious display. The panel hearing did so and found the UHPA memorial crosses to have the impermissible effect of endorsing religion. The panel decision followed the analytic model as per Weinbaum, considering the appropriate factors, including the purpose, context and historical elements related to the effect of the displays.

The panel decision considered the thorough and detailed record in this case, resolved below on cross summary judgment motions after extensive discovery. As per the mandates of *Weinbaum* and the more recent *Green v. Haskell County*, 568 F3d 784 (10<sup>th</sup> Cir. 2009), the panel considered what the “objective observer” would know, not limited to information gleaned from viewing the display. As detailed in the panel decision, the “reasonable observer” in this case knew far more than most in the community or the ordinary traveler who would encounter a UHPA memorial cross.

Appropriately, the panel decision considered what the objective observer would know that might weigh *against* a finding of endorsement by Utah of the religious expression inherent in the memorial Latin crosses. Thus, the panel determined there was no violation of the first prong, the purpose prong of the Lemon test. Slip Op. at 20-22.

**IV. THE PANEL DECISION IS CONSISTENT WITH FRIEDMAN V. BOARD OF COUNTY COMMISSIONERS OF BERNALILLO COUNTY**

The UHPA argues that the panel decision conflicts with the decision in Friedman v. Board of County Comm’ers of Bernalillo County, 781 F.2d 777 (10<sup>th</sup> Cir. 1985) suggesting that the reasonable observer approached by a UHP officer would be unable to recognize the UHP logo displayed on a trooper’s uniform and vehicle as the same logo displayed on the UHPA memorial crosses. However, the panel specifically found that “the reasonable observer’s fear of unequal treatment would likely be compounded by the fact that the[] memorial[s] carry the same symbol that appears on UHP patrol vehicles.” Slip Op. at 27-

28. The panel also specifically considered the memory and reaction of a reasonable objective observer upon seeing two large crosses bearing the UHP logo sited in front of the Highway Patrol office. Id. at n.13. UHPA now asserts that the panel was wrong in its analysis. UHPA's Rehear Petition 11-12. However, the panel decision does not conflict with Friedman and follows the same reasonable observer analysis as in that case.

Friedman involved representation of a cross on a county seal, not actual large physical crosses. Friedman, 781 F.2d 777, 778. The County seal at issue in Friedman was displayed on the uniforms of county sheriff deputies and on their vehicles. Id. As in Friedman, this case involves the use of a government logo or seal. However, the religious connection and endorsement by the Utah Highway Patrol involves different factors, is more potent than in Friedman and provides a stronger basis for an Establishment Clause violation. Slip Op. at 27-28. “. . . [T]he 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.” Slip Op. at 27. “And the significant size of the cross would only heighten this concern.” Id. at 28. Unlike in Friedman, “[t]he connection between the UHP and Christianity is perhaps even more strongly conveyed by the memorial crosses located immediately outside the UHP office.” Slip Op. at n.13. The panel expressed deep concern “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.” Id. UHPA's specific goal in having the official UHP logo on

the memorial crosses is to show a relationship between the crosses, the government and the deceased UHP trooper. Applt. App. 421, ¶¶ 19-20.

As in Weinbaum<sup>3</sup>, the claim in Friedman challenged a representation of a Roman cross on a government seal. Confronting actual monumental size UHPA crosses will cause a much different immediate reaction than observing the stylized crosses on Las Cruces' city logo or a Roman cross on the Bernalillo County seal.

**V. THE PANEL DECISION IS CONSISTENT WITH VAN ORDEN V. PERRY.**

The UHPA argues that the panel decision conflicts with Justice Breyer's concurrence in Van Orden v. Perry, 545 U.S. 677, 698 (2005). UHPA claims that Justice Breyer indicates some suggestion of religious purpose on the part of the monument's donors in Van Orden yet nevertheless deemed the monument to comport with the Establishment Clause. UHPA's Rehear Petition 13. UHPA argues that because, in contrast, they claim no religious purpose, the UHPA memorials must pass constitutional muster. Id. However, this argument fundamentally mis-characterizes the effects prong of Lemon. As the panel recognized, purpose is only *one* factor to be considered within the effect prong of the Lemon analysis. Slip Op. at 24. 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." Id. The panel properly

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<sup>3</sup> UHPA describes the city seals at issue in Weinbaum as "smallish" when compared to the monumental displays at issue in this case. UHPA's Rehear Petition 10.

considered purpose as one factor and concluded, based on the totality of relevant factors, that the UHPA memorials violate the Establishment Clause. Id. at 24, 35. UHPA simply disagrees with the panel's conclusion.

## **VI. OWNERSHIP OF CROSSES IS IRRELEVANT TO THE ESTABLISHMENT CLAUSE ANALYSIS**

UHPA's continued ownership of the crosses was fully analyzed by the panel but was not dispositive as to the Establishment Clause violation.<sup>4</sup> Ownership is not determinative of whose speech the crosses are. Speech need not be exclusively private or government speech. Moreover, private expression can be endorsed by government in violation of the Establishment Clause. *See County of Allegheny v. ACLU*, 492 U.S. 573, 600-01 (1989) (holding that a nativity scene displayed in courthouse violated Establishment Clause despite creche being owned by a Roman Catholic organization and not the government).

Although private speech can be endorsed by government in violation of the Establishment Clause, that issue was not reached in the panel decision because the panel held the memorials to constitute government expression under Pleasant Grove City v. Sumnum, 129 S.Ct. 1125 (2009). The panel fully considered the effects of UHPA ownership of the memorials applying Pleasant Grove, stating:

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<sup>4</sup> "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." Slip Op. at 7.

In Pleasant Grove City, the Supreme Court held that “just as government commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays on government land.” Id. at 1133. Thus, the Court [in Pleasant Grove] 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.’

Slip Op. at 12-14. Moreover, the Pleasant Grove Court indicated that monuments on government land will generally be treated as government speech because, regardless of ownership:

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. This is true whether the monument is located on private property or on public property, such as national, state, or city park land.

Pleasant Grove, 129 S.Ct. at 1133.

UHPA attempts to distinguish Pleasant Grove by noting it has retained ownership of the crosses and that UDOT issued a disclaimer<sup>5</sup> with regard to one (1) cross located at a rest stop in Summit County.<sup>6</sup> However, ownership is not determinative. Moreover, a written UDOT disclaimer, related to only one memorial, filed in some office means little when the reasonable observer confronts actual crosses with the UHP logo, most on

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<sup>5</sup> Applt. App. 2303.

<sup>6</sup> The imprecise language of the UDOT disclaimer is by no means a “formal disavowal” of the cross. Slip Op. at 7; Applt. App. 2303.

government property, with no immediate indication on them that they were privately erected. That a disclaimer was prepared and signed says a reasonable observer *needs* a disclaimer.<sup>7</sup> A disclaimer is not needed unless a reasonable observer would believe that the UHPA crosses were government speech. The panel made little of the disclaimer, stating:

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 [by issuing a disclaimer] from the message conveyed by these displays.

Slip Op. at 15.

## VII. ROMAN CROSSES DIFFER FROM THE TEN COMMANDMENTS

As per Van Orden, the panel properly considered, *inter alia*, the difference between the Roman Cross and the Ten Commandments. While the Ten Commandments have a secular, historical and moral message, there is no similar secular, historical and moral message in the Roman cross. Slip Op. at 31. While the Ten Commandments, in addition to their religious message, convey an “undeniable historical meaning,” a “secular moral message” and a “historical message,” Van Orden v. Perry, 125 S.Ct. 2854, 2863, 2869-70 (2005); *see* McCreary County v. ACLU, 125 S.Ct. 2722, 2738 (2005), such is not the case

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<sup>7</sup> The disclaimer recites only that UDOT “neither approves or disapproves the memorial marker,” 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.” Applt. App. 2303. The disclaimer does not directly and clearly say “The memorial is private speech and not state expression.”

with a Roman cross.<sup>8</sup> A Roman cross does not allude to a general notion of law or history; that cross is a strong clear reference to a sectarian concept of faith. Applt. App. 68; *see* McCreary, 125 S.Ct. at 2738.

The nature of the Roman cross is a major factor impacting the reasonable observer.

### **VIII. SALAZAR v. BUONO**

In seeking a rehearing, the UHPA points to *dicta* written by Justice Kennedy in Salazar v. Buono, 130 S. Ct. 1803 (2010) (plurality). UHPA’s Rehear Petition 1. That case was noted by the panel in its decision. Slip Op. at 9, n.5. Salazar was a plurality decision dealing with a memorial cross and the transfer of the government property on which it stood. Id. The Establishment Clause issue was not reached by the Court. Salazar at 1820-21; Slip Op. at 9, n.5. The Court considered only the land transfer. *See* Salazar 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). Justice Stevens, J. joined by Ginsburg, J. and Sotomayor, J., dissenting, id. at 1828.

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<sup>8</sup> In the plurality decision in Van Orden, Chief Justice Rehnquist spoke of an “acknowledgment[] of the role played by the Ten Commandments in our Nations’s heritage.” Van Orden, 125 S.Ct. 2854 at 2862 (2005). There is no parallel role to acknowledge for the Roman cross, the instrument of Christ’s death.

Both the plurality and dissenting opinions in Salazar contain *dicta* discussing hypothetical memorial crosses erected by government and/or on government land to commemorate fallen state troopers.<sup>9</sup> In his plurality opinion, Justice Kennedy wrote:

. . . The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm. **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. [citations omitted] Rather, it leaves room to accommodate divergent values within a constitutionally permissible framework.

Salazar v. Buono, 130 S.Ct. 1803, 1818-1819 (2010) (emphasis added).

The dissenting opinion of Justice Stevens joined by Justices Ginsberg and Sotomayor, also contains *dicta* addressing roadside crosses commemorating fallen troopers and concludes such crosses violate the Establishment Clause.

For the record, however, I cannot agree that a bare cross such as this conveys a nonsectarian meaning simply because crosses are often used to commemorate “heroic acts, noble contributions, and patient striving” and to honor fallen soldiers. *Ante*, at 1820. The cross is not a universal symbol of sacrifice. It is the symbol of one particular sacrifice, and that sacrifice carries deeply significant meaning for those who adhere to the Christian faith. **The cross has sometimes been used, it is true, to represent the sacrifice of an individual, as when it marks the grave of a fallen soldier or recognizes a state trooper who perished in the line of duty. Even then, the cross carries a religious meaning.** But the use of the cross in such circumstances is linked to, and shows respects for, the individual honoree's faith and beliefs.

Salazar, 130 S.Ct. at 1836, n.8 (emphasis added). Additional language in the Stevens’ dissent concludes a solitary cross erected on government land violates the Establishment Clause:

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<sup>9</sup> The concurring opinion of Justice Scalia and joined by Justice Thomas does not mention crosses commemorating fallen troopers.

. . . [T]he solitary cross conveys an inescapably sectarian message. See Separation of Church and State Comm. v. Eugene, 93 F.3d 617, 626 (C.A.9 1996) (O'Scannlain, J., concurring in result) (“[T]he City's use of a cross to memorialize the war dead may lead observers to believe that the City has chosen to honor only Christian veterans”). As the District Court observed, it is undisputed that the “[L]atin cross is the preeminent symbol of Christianity. It is exclusively a Christian symbol, and not a symbol of any other religion.” Buono I, 212 F.Supp.2d, at 1205. We have recognized the significance of the Latin cross as a sectarian symbol, and no participant in this litigation denies that the cross bears that social meaning. Making a plain, unadorned Latin cross a war memorial does not make the cross secular. It makes the war memorial sectarian.

Salazar, 130 S.Ct. at 1834-35.

Salazar contains opposing *dicta* regarding solitary memorial crosses on government property.

### CONCLUSION

The hearing panel properly considered the facts and issues before the Court and applied the proper legal analysis. The UHPA presents no substantial facts or issues of law overlooked or misapprehended by the hearing panel. Instead, UHPA simply presents arguments already considered and resolved by the hearing panel.

UHPA's Petition for Rehearing *En Banc* should be denied.

Respectfully submitted this 14<sup>th</sup> day of October 2010.

UTAH CIVIL RIGHTS & LIBERTIES  
FOUNDATION, INC.  
Attorney for PLAINTIFFS/APPELLANTS

*/S/ Brian M. Barnard*

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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 HIGHWAY PATROL ASSOCIATION** 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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