Nos. 10-1276, 10-1297

In the Supreme Court of the United States

UTAH HIGHWAY PATROL ASSOCIATION,

Petitioner,

v.

AMERICAN ATHEISTS, INC., ET AL.,

Respondents.

LANCE DAVENPORT, ET AL.,

Petitioners,

v.

AMERICAN ATHEISTS, INC., ET AL.,

Respondents.

On Petitions for Writs of Certiorari to the U.S. Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

EDWIN F. KAGIN
American Atheists, Inc.
P.O. Box 666
Union, KY 41091
859-384-7000

BRIAN M. BARNARD
Counsel of Record
Utah Civil Rights & Liberties Foundation
214 East 5th South St.
Salt Lake City, UT 84111
801-328-9531
officemanager@utahlegalclinic.com

Counsel for Respondents

QUESTIONS PRESENTED

1. Whether the Tenth Circuit properly refused to abandon the contextual analysis long applied by this Court to religious displays in Establishment Clause cases, in favor of a blanket rule insulating virtually all displays of religious imagery on public property—including Latin crosses, the preeminent symbol of Christianity—from constitutional review.

2. Whether the Tenth Circuit correctly determined that the 12-foot crosses here—erected, with the State's express authorization, on public property alongside roads and on the front lawn of a Utah Highway Patrol office and bearing the official insignia of the Utah Highway Patrol—are government speech subject to Establishment Clause scrutiny.

RULE 29.6 STATEMENT

American Atheists, Inc. is a non-profit corporation that has no parent and has issued no stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES, REGULATIONS, RULES, AND OFFICIAL POLICIES

MISCELLANEOUS

TABLE OF AUTHORITIES—continued

Page(s)

BRIEF IN OPPOSITION

STATEMENT

The State of Utah has authorized the placement of 12-foot-high Latin crosses, bearing the official insignia of the Utah Highway Patrol (UHP), on public property across the State as memorials to fallen UHP troopers. Utah does not allow the memorials to take any shape other than that of a Latin cross, the preeminent symbol of Christianity. The Tenth Circuit's conclusion that Utah's crosses violate the Establishment Clause is correct and does not conflict with this Court's cases or with the decision of any other Circuit. Further review is unwarranted.

A. Factual Background

1. The Utah Department of Transportation (UDOT) prohibits private memorials within the right-of-way of any Utah highway. CA10 App. 2272, 2281.[1] Notwithstanding the State's general policy against private roadside memorials, it has authorized the Utah Highway Patrol Association (UHPA) to erect a series of 12-foot Latin crosses to memorialize UHP troopers who die in the line of duty.[2] Pet. App. 6a, 9a; CA10 App. 2277, 2279, 2300, 2303. "The memorials use the preeminent symbol of Christianity, and they do so standing alone." Pet. App. 29a.

The first Utah memorial cross was erected in 1998; there were 13 by the time the decision below was rendered (Pet. App. 9a), and today are a total of

---

[1] "CA10 App." refers to Appellants' Appendix in the Tenth Circuit; "Pet. App." refers to the Appendix in No. 10-1276.

[2] Photographs of some of these crosses, reproduced from the appendix below, are included in Appendix A.

14. With three exceptions, the crosses are on public property: Eight are located on government-owned land alongside state roads and two are located on the front lawn of a UHP office. Pet. App. 9a & n.3; CA10 App. 2348-2350. These locations were selected because of their visibility and prominence. Pet. App. 8a, 44a ¶13, 47a ¶35. For example, anyone walking past the UHP office—or being walked into the UHP office against his will—is bound to notice the crosses. Pet. App. 30a n.13. Similarly, a person who uses "State owned and maintained roads, highways, facilities, rest areas, etc. where the memorial crosses are located" cannot but help encountering them. Pet. App. 48a ¶37.

"[T]he State continues to own and control the state land on which" the crosses are located. Pet. App. 9a. "[T]he record in this case demonstrates [that] the State tightly controls the displays placed on the rights-of-way near its roads." Pet. App. 18a n.8; *id.* at 128a (permit: "UDOT [has] responsibility and authority over the property and location of this memorial marker"). Although the State reserves the right to remove the memorials, the first cross was emplaced "more than ten years ago, and there is no evidence that any of the memorial crosses erected since that time have been removed." Pet. App. 17a-18a. Moreover, as to the crosses in front of the UHP office, the State has even reassured UHPA that it would "make every effort to accommodate the crosses at another location on the property," should the need arise. BIO App. 6a.

The Utah memorial crosses are sparsely adorned and stand by themselves. Pet. App. 29a, 34a, 47a ¶34. Immediately beneath the cross-bars' intersection hangs a large, "conspicuous" depiction of UHP's

official, trademarked "beehive" logo, which is used with the State's permission. Pet. App. 6a, 44a-46a ¶¶16, 23; CA10 App. 356. The insignia on the crosses is identical to that displayed on UHP patrol vehicles. CA10 App. 421 ¶¶19-20. "The UHP trooper's name, rank, and badge number are printed in large letters on the horizontal cross-bar." Pet. App. 6a. The year that the trooper died is printed in smaller letters on the vertical cross-bar. *Ibid.* The crosses also contain a "small plaque containing a picture of the trooper and some biographical information." *Id*. at 6a-7a. No sign or disclaimer accompanies the crosses to explain that they are erected and owned by a private group.[3] CA10 App. 630 ¶19, 678 ¶19.

The cross symbol is integral to the memorials' design. Although UHPA now claims that it would be willing to use a different symbol at the request of a fallen trooper's family, it stated in 1996 that one of its "desired result[s]" was to remain "firm" on the "[u]se of the cross symbol." Pet. App. 8a; CA10 App. 2262. Even more tellingly, the State has repeatedly confirmed—"before the district court and in their briefs and argument before" the Tenth Circuit—that the *only* shape that the State would approve was that of the Latin cross. Pet. App. 8a n.2; see BIO App. 8a, 9a-15a ("[I]f [UHPA] were to change the shape of the trooper memorial[,] … the State Defendants and agencies would not be able to approve the new memorial … in the same manner that they had

[3] On one occasion, the approval permit recited that the State "neither approves or disapproves the memorial marker." Pet. App. 9a. However, this "disclaimer" was issued only as to one of the crosses and only after three others already had been erected. Cf. Davenport Pet. 4-5; UHPA Pet. 5-6. The crosses themselves bear no such disclaimer.

for the prior memorials in the shape of a cross."); Davenport CA10 Ans. Br. 14-15.[4] For the loved ones of a fallen UHP trooper, then, the choice that the State offers is a Latin cross or no roadside memorial at all.

2. Almost immediately after the first memorial cross was erected, American Atheists contacted UHPA to complain that a Latin cross was being displayed on government property. CA10 App. 2352, 2354. Respondents are not alone in perceiving the crosses as conveying the message that the State endorses Christianity. Pet. App. 12a, 46a ¶28; *e.g.*, CA10 App. 610, 623, 631-632, 660, 664, 667-668, 691-692, 708. That is hardly surprising. After all, the "'Latin cross is unequivocally a symbol of the Christian faith'" and "has historically been associated with Christianity and used by many Christian churches as a religious symbol." Pet. App. 28a, 47a ¶30. In the memorial context, moreover, the Latin cross is a traditional *Christian* symbol of death, representing the story of the death and resurrection of Jesus Christ. Pet. App. 32a; CA10 App. 618 ¶11, 660 ¶¶17-18. Many members of other faiths, therefore, would not want a Latin cross to mark the location of their deaths. CA10 App. 664 ¶¶2-4.

While the Church of Jesus Christ of Latter-day Saints ("LDS Church"), the majority religion in Utah, does not use the cross as a symbol in its religious practices, see UHPA Pet. 6, that certainly does not mean that members of the LDS Church perceive the Latin cross as a non-religious or non-Christian sym-

---

[4] While the State now tries to create doubt on this point, noting that an alternative symbol has never been *requested* by a trooper's family (Davenport Pet. 3-4 n.2), the record is clear that the State would deny such a request if made.

bol. To the contrary, the LDS Church recognizes the cross's Christian religious significance and "'remember with reverence the suffering of the Savior.'" Pet. App. 38a; CA10 App. 2238. Indeed, the contemporary LDS Church eschews the use of the cross as a symbol only because, "for [it], the cross is the symbol of the dying Christ, while [its] message is a declaration of the Living Christ." Pres. Gordon B. Hinckley, *The Symbol of Our Faith*, Ensign (Apr. 2005); CA10 App. 2241. The Christian meaning of the Latin cross to members of the LDS Church remains undiluted. And, of course, "there are many cross-revering Christians and many non-Christians for whom the Roman cross has an unmistakable Christian meaning." Pet. App. 38a.

B. Proceedings Below

Respondents brought this § 1983 action against Utah state employees who, in their official capacities, authorized the UHPA to incorporate the UHP logo on the memorial crosses and to place some of them on State land. Pet. App. 9a-10a. Respondents argued that the crosses violated the Establishment Clause and sought, *inter alia*, an injunction ordering the removal of the UHP beehive logo from the crosses and the removal of the crosses themselves from public land. Pet. App. 10a. Resolving the parties' cross-motions for summary judgment, the district court granted summary judgment to all defendants (now petitioners). Pet. App. 75a.

The Tenth Circuit unanimously reversed, concluding that the Utah memorial crosses violate the Establishment Clause. The panel explained that it was rendering a "very case-specific" decision that turned on "the particular context and history of these displays." Pet. App. 22a. To that end, the court re-

jected the assertion that "any time government conduct involves the use of a Latin cross, there is an Establishment Clause violation." Pet. App. 22a n.9. Undertaking a detailed "examination of the whole record," the Tenth Circuit considered the "larger factual and historical context" to "determine whether these memorial crosses would have an impermissible effect on the reasonable observer." Pet. App. 18a, 27a. Among other things, the court of appeals examined the physical characteristics of the crosses (*e.g.*, their massive size and the prominence of the official UHP logo), their locations (*e.g.*, in front of an official State office), and the use of crosses in other contexts as symbols of death. Pet. App. 6a-9a, 27a-38a. The court concluded that, on balance, the crosses had the "impermissible effect of conveying to the reasonable observer that the State prefers or otherwise endorses Christianity." Pet. App. 31a.

Over two dissents, petitioners' request for rehearing en banc was denied. Pet. App. 79a-80a.

REASONS FOR DENYING THE PETITIONS

The Tenth Circuit's fact-specific decision that the Utah memorial crosses violate the Establishment Clause does not conflict with a decision of any other Circuit or of this Court. The Tenth Circuit's ruling was correct on the merits and does not warrant further review.

I. The Alleged Circuit Splits Are Illusory.

Petitioners claim that since this Court's ruling in *Van Orden* v. *Perry*, 545 U.S. 677 (2005), the circuits have divided over whether the test derived from *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), and refined in this Court's subsequent cases, applies to religious displays on public property. But the only religious-

display cases that petitioners cite in which an appellate court has declined to apply the *Lemon* test are two Ten Commandments cases factually indistinguishable—and thus directly controlled by—this Court's decision in *Van Orden*. In all the other cases, including those involving Ten Commandments monuments more like those addressed by this Court in *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844 (2005), the lower courts have faithfully relied on *Lemon*. That includes the only other recent circuit decision addressing Latin crosses erected on public land (as well as a long line of other cross-display cases). In short, the circuits are in broad agreement that *Lemon* applies to religious displays like those at issue here, and neither the Tenth Circuit's application of that test nor the result that it reached conflicts with any other appellate ruling.

A. As an initial matter, it is telling that the two petitions identify two *different* purported circuit splits. Davenport Pet. 12-16; UHPA Pet. 14-16. The Davenport petition (at 14) claims that the Fourth and Eighth Circuits have followed the approach set out in Justice Breyer's concurring opinion in *Van Orden*. In contrast, the UHPA petition (at 15) asserts that the Eighth Circuit has followed the *Van Orden* plurality's approach and alludes only glancingly to the Fourth Circuit's decision. The UHPA petition (at 15-16) further claims that the Fifth and Ninth Circuits have followed Justice Breyer's *Van Orden* opinion, whereas the Davenport petition does not mention the Fifth Circuit and claims that the Ninth Circuit (in a case that the UHPA does not even cite) has "taken yet a third approach." Davenport Pet. 15-16 (citing *Trunk* v. *City of San Diego*, 629 F.3d 1099 (9th Cir. 2011)). That the two petitions contradict each other about the nature of the alleged split re-

flects that petitioners have trumped up a conflict that is not actually reflected in the cases.

B. No matter how they are characterized, the splits that the petitions purport to identify are artificial. Whatever superficial variances petitioners identify in the lower court rulings result not from those courts deciding similar cases differently, but instead from a careful application of this Court's precedents, which have long instructed that different Establishment Clause analyses apply in different factual settings. Cf. *Lynch* v. *Donnelly*, 465 U.S. 668, 679 (1984) ("we have repeatedly emphasized our unwillingness to be confined to any single test or criterion").

For example, many of the cases on which petitioners rest their purported circuit splits involve challenges to displays of the Ten Commandments. *Card* v. *City of Everett*, 520 F.3d 1009 (9th Cir. 2008); *ACLU of Ky.* v. *Mercer Cnty.*, 432 F.3d 624 (6th Cir. 2005); *ACLU Neb. Found.* v. *City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005). Those cases are directly governed by this Court's rulings in *Van Orden* and *McCreary County*, which expressly considered how the Establishment Clause applies to Ten Commandments displays. The differences that petitioners identify in the lower courts' recent Ten Commandments rulings are the natural consequence of this Court's context-sensitive analyses. Those differences do not reflect any actual disagreement in the Circuits, and none of the rulings conflicts with the Tenth Circuit's decision here.

The two Ten Commandments monuments challenged in *Van Orden* and *McCreary County* had very different histories, purposes, and contexts. Compare *Van Orden*, 545 U.S. at 701-03 (Breyer, J., concurring), with *McCreary Cnty.*, 545 U.S. at 851-57.

Those differences led the Court to uphold the monument in *Van Orden* at the same time as it found the display in *McCreary County* unconstitutional. Those differences also led Justice Breyer, who provided the deciding vote in *Van Orden*, to rely on a somewhat different analytic approach in evaluating the particular monument at issue there.

In his concurring opinion, Justice Breyer described the case as "borderline," calling for "the exercise of legal judgment." *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring). He thus explained that while the *Lemon* factors "provide useful guideposts," he "rel[ied] less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment's Religion Clauses themselves." *Id.* at 700, 703-04.[5]

This Court's analysis in *McCreary County* more closely tracked *Lemon*. In striking down a different Ten Commandments display, a single Opinion of the Court emerged. That opinion not only applied *Lemon* (*McCreary County,* 545 U.S. at 859-60), it expressly rejected petitioners' invitation to abandon or reformulate that test (*id.* at 861). And Justice Breyer joined the Court's opinion in full. Remarkably, neither of the petitions so much as mentions *McCreary County*. But, as we now discuss, the differences in

---

[5] Although he followed this Court's longstanding reluctance to commit to a single test for all Establishment Clause cases, Justice Breyer's analysis followed the basic contours of *Lemon*. He focused on the "message" that the monument sent in "the context of the display" (*Van Orden*, 545 U.S. at 701), the "objectives of those who mounted them, and the effect of this readily apparent objective upon those who view them" (*id.* at 703). And he observed that the result he reached would likely have been the same under a more formal application of the *Lemon* test. *Ibid.*

result and approach between *Van Orden* and *McCreary County* fully explain the (modest) differences in the subsequent lower-court cases that petitioners cite.

C. Petitioners identify only two cases in which a federal appellate court has declined to rely on *Lemon* to evaluate the constitutionality of a religious display on public property: the Eighth Circuit's decision in *Plattsmouth* and the Ninth Circuit's in *Card*. But those cases do not indicate a circuit split.

The critical point, which petitioners ignore, is that *Card* and *Plattsmouth* both involved Ten Commandments displays "virtually identical" to the one upheld in *Van Orden*. *Card*, 520 F.3d at 1000; *Plattsmouth*, 419 F.3d at 775. Confronted with such displays, it is hardly surprising that the Eighth and Ninth Circuits followed the roadmap set out in *Van Orden*. That approach reflects not some general rejection of the *Lemon* test in religious-display cases, but instead the simple fact that this Court had provided specific guidance about how an indistinguishable Ten Commandments monument was to be analyzed. See *Plattsmouth*, 419 F.3d at 775-76 ("The Supreme Court's decision in *Van Orden* governs our resolution of this case.").

Indeed, the Ninth Circuit expressly recognized that *Lemon* remained "the general rule for evaluating whether an Establishment Clause violation exists" (*Card*, 520 F.3d at 1016), but that *Van Orden* had carved out "an exception for certain Ten Commandments displays" (*id.* at 1018). Nodding to *McCreary County*, the court emphasized that "not all Ten Commandments displays will fit within the exception articulated by Justice Breyer," but that the

"exception at least includes the display of the Ten Commandments at issue here." *Ibid.*[6]

Petitioners claim that *Plattsmouth* and *Card* conflict with the Sixth Circuit's decision in *Mercer County* (Davenport Pet. 14; UHPA Pet. 16), but they ignore the obvious difference presented by that case.[7] The Ten Commandments display challenged in *Mercer County* was "identical in all material respects to the third and final display in *McCreary County*." *Mercer Cnty.*, 432 F.3d at 626. Given that, the Sixth Circuit naturally looked—as this Court did in *McCreary County*—to the *Lemon* test. *Id.* at 635-36. That approach is entirely consistent with *Plattsmouth* and *Card*. It makes perfect sense for a court faced with a display like one analyzed in *McCreary County* to follow the methodology used in that case, while other courts, evaluating displays indistinguishable from those at issue in *Van Orden*,

---

[6] As discussed below, the Ninth Circuit confirmed *Card's* limited reach in a subsequent case, which relied on *Lemon* to strike down a very different sort of religious display—a Latin cross. *Trunk*, 629 F.3d at 1105-25.

[7] While it would not warrant certiorari here in any event, petitioners' claim of a conflict between *Plattsmouth* and *Card* is misguided. It simply is not accurate to say that the Eighth Circuit followed the *Van Orden* plurality's approach at the expense of Justice Breyer's "contextual legal analysis." UHPA Pet. 15. *Plattsmouth* took full consideration of Justice Breyer's approach. See 419 F.3d at 776, 778 & nn.7-8. Like Justice Breyer—and the Ninth Circuit in *Card* (520 F.3d at 1019-21)—the Eight Circuit upheld the monument at issue after taking account of its setting (*Plattsmouth*, 419 F.3d at 777 n.7) and the longstanding lack of objection to its presence (*id.* at 778).

follow the analysis used in that case. Such unsurprising results in no way suggest a circuit split.[8]

Even more to the point, these rulings do not conflict with the Tenth Circuit's decision here. Unlike *Plattsmouth* and *Card*, this case does not involve a religious display akin to, much less indistinguishable from, the monument at issue in *Van Orden*. As the Tenth Circuit recognized, therefore, this case is not controlled by *Van Orden*. Pet. App. 34a ("[T]he memorial crosses at issue here cannot be meaningfully compared to the Ten Commandments display that the Supreme Court upheld in *Van Orden*."). The Tenth Circuit's application of *Lemon* to this factually and legally distinguishable situation is not in tension with the approach taken by the Eighth and Ninth Circuits. To the contrary, the Tenth Circuit's approach was entirely consistent with how other circuits have resolved analogous cases both before and since *Van Orden* and *McCreary County*.

D. Beyond the distinct class of Ten Commandments cases, petitioners cite *Skoros* v. *City of New York*, 437 F.3d 1 (2d Cir. 2006), and the Ninth Circuit's recent decision in *Trunk*. Davenport Pet. 15-16; UHPA Pet. 16. But these decisions also are fully consistent both with each other and with the Tenth Circuit's decision.

Skoros addressed whether it violated the Establishment Clause for a public school to erect a holiday display that included a menorah but not a crèche or nativity scene. The court held that it did not, apply-

---

[8] *Mercer County*, like *Plattsmouth* and *Card*, upheld the challenged display, so even if the courts were to have disagreed in their approaches, the dispute would be academic.

ing the *Lemon* test. *Skoros*, 437 F.3d at 16-18, 29-30. The approach followed in *Skoros* is indistinguishable from that used by the Tenth Circuit in this case. Nor does the Second Circuit's decision conflict with *Plattsmouth* or *Card*. There is no reason to think that the Eighth or Ninth Circuits would have declined to apply *Lemon* to the very different sort of display at issue in *Skoros*. Cf. *Cnty. of Allegheny* v. *ACLU*, 492 U.S. 573 (1989) (applying *Lemon* to displays of crèche and menorah); *Roark* v. *S. Iron R-1 Sch. Dist.*, 573 F.3d 556, 563 & n.4 (8th Cir. 2009) (applying *Lemon* to Bible-distribution program at a school).

Trunk is the only case petitioners cite that involved a cross. It is telling, therefore, that the Ninth Circuit there reached the same result as the Tenth Circuit here, and through much the same reasoning. *Trunk* held that the display of a 43-foot Latin cross, as the centerpiece of a veterans' memorial on Mount Soledad, violated the Establishment Clause. 629 F.3d at 1125. To be sure, the Ninth Circuit noted some ambiguity about whether the Establishment Clause inquiry should be guided exclusively by *Lemon* or instead whether it should also consider the factors outlined in Justice Breyer's opinion in *Van Orden*. *Id.* at 1106-07. But the court ultimately found it unnecessary to resolve that question because "both cases guide us to the same result." *Id.* at 1107.

Indeed, *Trunk* relied heavily on the *Lemon* test, including the endorsement component. *Id.* at 1107-25. The court explained that the "heart of this controversy is the primary effect of the Memorial," and that the way to assess that was to ask whether a reasonable observer would conclude that the memorial sent a message of endorsement. *Id.* at 1109-

10. In holding that it would, the Ninth Circuit expressly followed the Tenth Circuit's decision in this case. It agreed that because "the cross is 'not a generic symbol of death,' but rather 'a Christian symbol of death that signifies or memorializes the death of a Christian,' a reasonable observer would view a memorial cross as sectarian in nature." *Id.* at 1112 (quoting Pet. App. 32a). The Ninth Circuit explained that "[b]y claiming to honor all service members with a symbol that is intrinsically connected to a particular religion, the government sends an implicit message 'to nonadherents that they are outsiders not full members of the political community….' This message violates the Establishment Clause." *Id.* at 1125 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)). Both in approach and outcome, therefore, the Ninth Circuit's decision is consistent with the Tenth Circuit's ruling.[9]

While they mischaracterize the import of *Trunk*, petitioners also ignore the long line of appellate decisions striking down displays of Latin crosses on public land. See, *e.g.*, *Separation of Church & State Comm.* v. *City of Eugene*, 93 F.3d 617 (9th Cir. 1996) (per curiam) (Establishment Clause violated by 51-

---

[9] That the court in *Trunk* also invoked Justice Breyer's opinion in *Van Orden* presents no conflict. The Ninth Circuit certainly did not hold that *Van Orden* rather than *Lemon* provides the governing test for evaluating cross displays. Nor did the court affirmatively hold that both tests apply, as petitioners suggest. Davenport Pet. 15. To the contrary, *Trunk* said expressly that it "need not resolve the issue of whether *Lemon* or *Van Orden* controls our analysis." 629 F.3d at 1107. That was because nothing turned on that question. The court made clear that both approaches would lead to the same result—a finding that the cross violated the Establishment Clause. *Ibid.*

foot "war memorial" cross on top of a hill in a public park); *Gonzales* v. *N. Twp. of Lake Cnty.*, 4 F.3d 1412 (7th Cir. 1993) (memorial cross erected in public park to honor fallen servicemen); *ACLU of Ill.* v. *City of St. Charles*, 794 F.2d 265 (7th Cir. 1986) (large cross atop public building); *ACLU of Ga.* v. *Rabun Cnty. Chamber of Commerce, Inc.* 698 F.2d 1098 (11th Cir. 1983) (per curiam) (35-foot lighted cross on public land); *Gilfillan* v. *City of Philadelphia*, 637 F.2d 924 (3d Cir. 1980) (platform with large cross erected for papal visit). Both *Trunk* and the Tenth Circuit's decision in this case fit comfortably in this tradition, one in which there is uniformity in the circuits and no basis for this Court's review.

E. Finally, petitioners cite the Fourth Circuit's decision in *Myers* v. *Loudoun County Public Schools*, 418 F.3d 395 (4th Cir. 2005), and the Fifth Circuit's in *Staley* v. *Harris County*, 461 F.3d 504 (5th Cir. 2006), but neither case even remotely evidences a circuit split.

Myers is not even a case involving "passive displays that contain religious imagery." Davenport Pet. 14. The case instead involved a challenge to the phase "under God" in the Pledge of Allegiance. The Fourth Circuit held that there was no violation of the Establishment Clause. 418 F.3d at 397. But the portion of *Myers* that UHPA relies on in support of its alleged conflict (Pet. 15) speaks not for the Fourth Circuit, but only a single judge. 418 F.3d at 402-05 (Williams, J.). The two other members of the panel made clear that their votes did not turn on any generalized rejection of *Lemon* or on the "historical recognition of religion in public life" (UHPA Pet. 15), but instead were narrowly confined to the unique context of the Pledge of Allegiance. *Id*. at 408-09 (Duncan, J.,

concurring); 409-11 (Motz, J., concurring in the judgment). *Myers* reflects the unique approach that this Court has directed in dealing with the Pledge of Allegiance. It conflicts neither in result nor reasoning with the decision in this case or with any of the other cases that petitioners cite.

As for *Staley*, which involved the display of an open Bible in front of a courthouse, the panel opinion on which UHPA relies (Pet. 15), was vacated as moot by the en banc court. *Staley* v. *Harris Cnty.*, 485 F.3d 305 (5th Cir. 2007). In any event, the now-superseded panel opinion applied the same basic mode of analysis as did the Tenth Circuit here, looking to the *Lemon* test and asking whether a "reasonable observer" would believe that the challenged "display has the effect of endorsing religion," in light of the display's history and context. *Staley*, 461 F.3d at 508-13.

F. In short, petitioners cannot point to a single non-Ten Commandments case since *Van Orden* and *McCreary County* in which a federal appellate court refused to apply *Lemon* to evaluate a passive religious display. And even in the Ten Commandments' realm, the only decisions in which *Lemon* has not been used are two cases factually indistinguishable from, and thus directly controlled by, *Van Orden*. In every other case that petitioners cite—including those involving Ten Commandments monuments like the one at issue in *McCreary County* as well as those involving different types of religious displays altogether, including Latin crosses—the circuits have relied on *Lemon*. That includes the Tenth Circuit's decision in this case. There is no circuit split.

Petitioners thus are wrong in claiming that the decision below creates a lack of uniformity in nation-

al law. It simply is not true, for example, that a "litigant in one circuit will have to satisfy one test, and a litigant in another circuit, another." Davenport Pet. 17. The Tenth Circuit's approach in this case is entirely in line with how its sister circuits have decided similar cases, and this Court's review is not warranted.

II. Petitioners Overstate The Importance Of This Case.

The Tenth Circuit's decision did little more than apply this Court's longstanding *Lemon* test to a particular set of facts. That ruling broke no new constitutional ground, nor did it address an issue that is likely to recur in other cases. Petitioners' claim that this case has "important national consequences" (Davenport Pet. 16) is wildly overblown.

A. Petitioners say that "no other court in the Nation has ever before held unconstitutional roadside crosses memorializing the dead." Davenport Pet. 12. But if that is so, it is only because the issue has not come up before. Indeed, we are aware of no other federal appellate rulings even *addressing* whether roadside cross displays like the ones here violate the Establishment Clause, much less holding that such displays are constitutional.[10]

Nor is there any reason to think that cases presenting similar facts will occur in the future. Petitioners do not point to a single pending case challenging a roadside memorial-cross program on Establishment Clause grounds. An *amicus* brief filed by

---

[10] As discussed above (at 14-15), petitioners ignore the series of appellate decisions striking down the display of large Latin crosses on public property.

several state Attorneys General claims that the decision below threatens supposedly similar programs in other states, but the brief actually undermines that assertion, as the programs discussed do not involve roadside cross displays akin to those authorized in Utah.[11] For example:

- California's standardized memorial sign contains the text "PLEASE DON'T DRINK AND DRIVE." Cal. Dep't of Transp., *Victims Memorial Sign Program*, http://tinyurl.com/6av4428. California "remove[s] … crosses … within the state's highway right-of-way." Cal. Dep't of Transp., *Report to the California State Legislature: Evaluation of "Please Don't Drink and Drive" Victims Memorial Sign Program*, App. B, at 5 (Jan. 2006), http://tinyurl.com/66urb6b.
- Florida's standardized memorial sign contains the text "Drive Safely; In Memory." The state prohibits "[a]ny other additional decorations or ornaments." Fla. Dep't of Transp., *Highway Safety Memorial Markers*, at 2 & Att. A. (Mar. 15, 2007), http://tinyurl.com/3u4j3mg.
- New Mexico's official memorial signs contain only the text "Please Don't Drink and Drive [¶] In memory of [name]." N.M. Code R. § 18.20.7.8.[12]

---

[11] See also Appendix F (describing various other states' roadside memorial laws). All websites were last visited on July 20, 2011.

[12] Tellingly, a spokesperson for New Mexico Attorney General Gary King acknowledged that the decision below would not af-

- Virginia bans symbols on or near its standardized memorial signs, which contain only text. Va. Dep't of Transp., *Roadside Memorials*, at (D)(1), http://tinyurl.com/3j85kqg; Va. Dep't of Transp., *Guidelines for Roadside Memorials*, at 2 (June 1, 2006), http://tinyurl.com/5uglwva.
- Wyoming removes private roadside memorials. WYDOT, *Roadside Memorial Program*, http://tinyurl.com/6k64gjq. Its official sign depicts a broken heart and a dove. WYDOT, *Roadside Memorial Program*, at 2 (Apr. 2003), http://tinyurl.com/5ujw4mh.[13]

None of these states' standardized or official memorial signage is in the shape of a cross or depicts a cross. And so far as we have been able to determine, ***no state*** authorizes private parties to erect anything like the 12-foot-tall Latin crosses at issue here—much less crosses with the official insignia of a state entity on them. The States' amicus brief provides no evidence that the Tenth Circuit's ruling casts doubt on, much less dooms, programs in other states that merely acquiesce in private parties displaying small items of their choice on roadsides to commemorate the dead.[14]

---

fect roadside memorials in New Mexico, because "they aren't 'state-sponsored' like the Utah Highway Patrol crosses." See Steve Terrell, *Roadside memorials safe from appeals court ruling*, Santa Fe New Mexican (Aug. 24, 2010), http://tinyurl.com/3s82n2f; cf. N.M. Stat. Ann. § 30-15-7(A) (protecting certain private roadside memorials).

[13] Photographs of representative memorials allowed under other states' laws are included in Appendix G.

[14] Even if the displays allowed in others states were similar to the Utah program, and even if it were likely that such displays

B. Further undermining petitioners' arguments is the fact that the decision below, by its terms, is highly fact-specific. As the Tenth Circuit observed, "[c]ontext can determine the permissibility of displays of religious symbols on public property." Pet. App. 27a. In finding an Establishment Clause violation, therefore, the Tenth Circuit did not make some general pronouncement against all religious displays, or even all displays that include crosses. Instead, the court relied on the specific facts and circumstances of the Utah roadside memorial crosses program. In particular, the Tenth Circuit noted: (1) the massive size and prominence of the crosses; (2) the fact that the crosses stand alone and are not part of a display involving other, non-religious symbols; (3) the fact that the crosses bear the imprimatur of state entity, and in two instances stand immediately in front of that entity's offices; and (4) the fact that the cross is the exclusive symbol that the State permits. *Id.* at 28a-30a, 35a.

The Tenth Circuit's decision thus speaks to the validity of this particular cross-display program and nothing else. The court of appeals certainly did not suggest that religious symbols may never be displayed on public property, or that the government may never allow or erect grave markers (or similar memorials) that incorporate the Latin cross or other religious iconography. To the contrary, the court expressly left room for such displays, including cross

---

would be the subject of Establishment Clause challenges, there still would be no need for this Court's review here. Any questions about the constitutionality of such programs should be allowed to percolate in the lower courts. There is no reason for this Court to review the first appellate ruling to address that particular issue.

displays, whose "context or history avoid the conveyance of a message of governmental endorsement of religion." Pet. App. 29a. To that end, the decision below fits comfortably alongside the Tenth Circuit's prior decision in *Weinbaum* v. *City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008), which held that it did not violate the Establishment Clause for the city of Las Cruces—given its name and history—to employ a three-cross symbol to represent the city. Pet. App. 23a (discussing *Weinbaum*).

Accordingly, there is no basis for petitioners' assertion that "well-known memorial crosses," such as those situated in Arlington National Cemetery, are in danger. Those monuments present circumstances very different from those raised by the Utah roadside crosses and the other cross displays that courts have rejected. As the Ninth Circuit explained in *Trunk*, "the Argonne Cross and the Canadian Cross of Sacrifice at Arlington National Cemetery and the Irish Brigade Monument at Gettysburg are located among the many secular monuments in those memorials. The crosses are on equal footing with these other monuments and do not dominate the landscape." 629 F.3d at 1124. The Ninth Circuit specifically noted that those crosses are "merely one facet of … large, secular memorial[s] in which [they do] not hold a place of prominence." *Ibid.*; see also *id.* at 1102, 1113-15. Nothing in the Tenth Circuit's ruling is to the contrary.

Nor does the decision below say anything about the legitimacy of memorials used to mark other graves at military cemeteries. Headstones at Arlington, for example, are rectangular and may contain any of over 35 distinct religious (or atheist) emblems. CA10 App. 2184-93. They are nothing like the stand-

alone cross monuments at issue here. Granting review in this case is not necessary to preserve such memorials from Establishment Clause attack.

III. The Tenth Circuit's Decision Is Correct And Faithfully Applied This Court's Precedent.

Consistent with this Court's Establishment Clause cases, the decision below carefully examined the "larger factual and historical context" of the Utah memorial crosses before concluding that they impermissibly convey a message of religious endorsement to a reasonable observer. Pet. App. 27a. Petitioners contend that the court of appeals misapplied this mode of analysis to the particular facts of this case in a variety of ways, but their complaints are misguided.

A. Petitioners assert that the Tenth Circuit erred when it determined that Latin crosses have religious *content* before moving on to evaluate the overall endorsement *effect* of the Utah memorial crosses in light of their context. Davenport Pet. 30; UHPA Pet. 21.

But that is exactly what this Court's cases assessing the constitutionality of passive displays have done. In *County of Allegheny*, for example, the Court looked first at the county's crèche display and remarked that there was "no doubt … that the crèche *itself* is capable of communicating a religious message." 492 U.S. at 598 (emphasis added). Only then did the Court look at whether "the context of the display detract[ed] from the crèche's religious message" such as to "negate the endorsement effect." *Id.* at 598-99 & n.48; *id.* at 625-27 (O'Connor, J., concurring); see *McCreary Cnty.*, 545 U.S. at 868 ("religious message" of Ten Commandments text was "hard to

avoid in the absence of a context plausibly suggesting a message going beyond an excuse to promote the religious point of view"). Similarly, Justice Breyer's concurrence in *Van Orden* recognized that "the [Ten] Commandments' text undeniably has a religious message, invoking, indeed emphasizing, the Deity." 545 U.S. at 700-01. Justice Breyer *then* "examine[d] how the text [was] *used*" in the "context of the display" to "determine the message" that it conveyed. *Id.* at 701.

The decision below therefore correctly took as a starting point the fact that the Latin cross is the preeminent symbol of Christianity. Pet. App. 28a-30a. This Court has repeatedly recognized that the Latin cross is the paradigmatic example of an overtly religious, Christian symbol. *E.g.*, *Cnty. of Allegheny*, 492 U.S. at 599 ("It is as if the county had allowed the Holy Name Society to display a cross on the Grand Staircase at Easter …."); *id.* at 661 (Kennedy, J., concurring in part and dissenting in part) ("I doubt not … that the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall."); *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 792 (1995) (Souter, J., concurring in part) (Latin cross is "the principal symbol of Christianity around the world"); see also *Trunk,* 629 F.3d at 1110 ("courts of appeals … have unanimously agreed" that the "Latin cross is the preeminent symbol of Christianity"); *City of St. Charles*, 794 F.2d at 271 (Posner, J.) ("[T]he Latin cross … is, indeed, the principal symbol of Christianity as practiced in this country today.").

B. Petitioners also incorrectly assert that the Tenth Circuit applied a "presumption" that the display of crosses on public property is unconstitutional.

UHPA Pet. 22-23. But the court specifically rejected the assertion "that any time government conduct involves the use of a Latin cross, there is an Establishment Clause violation." Pet. App. 22a n.9.

Furthermore, contrary to what petitioners imply, the Tenth Circuit did not hold that display of a Latin cross is constitutional only if its context entirely "nullifies" its religious content, rendering it a purely "secular" symbol. UHPA Pet. 24-27. In fact, the court of appeals made clear that even if a display involves a Latin cross, which is "unequivocally a symbol of the Christian faith" and predominantly sectarian, it nonetheless may pass Establishment Clause muster if its "context or history avoid the conveyance of a message of governmental endorsement of religion." Pet. App. 28a-29a.

Thus, the court of appeals looked, as this Court's precedents require, at whether "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." Pet. App. 33a (emphasis added); see *McCreary Cnty.*, 545 U.S. at 868-69 (display unconstitutional because it "did nothing … to counter the sectarian implication" of the Ten Commandments); *Cnty. of Allegheny*, 492 U.S. at 598-99 & n.48 ("nothing in the context of the display detracts from the crèche's religious message" or "negate[s] the endorsement effect").

Far from "expressly disavow[ing] any inquiry into whether the Government's actions … caused excessive entanglement," cf. *Salazar* v. *Buono*, 130 S. Ct. 1803, 1818 (2010), or ending its analysis upon concluding that the Utah memorial crosses have religious content, the Tenth Circuit carefully scrutinized their context to determine their effect.

C. Petitioners next take issue with how the court of appeals assessed the context and history of the Utah memorial crosses. They assert that the decision below constructed a "selectively informed" reasonable observer who "ignored" various facts regarding the memorial crosses. Davenport Pet. 24-29; UHPA Pet. 27-32. Petitioners contend that the court of appeals should have given more weight to some facts while according less significance to the facts that support the Tenth Circuit's determination that the crosses convey a religious message (*e.g.*, the "massive size of the crosses," that they "display the official insignia of a state entity," and that the cross is the exclusive memorial symbol that the State permits). Pet. App. 34a-35a. But not only is this argument not a basis for this Court's review—"misapplication of a properly stated rule of law" hardly warrants certiorari, see Sup. Ct. R. 10—it also fails on its own terms.

A reasonable observer viewing the Utah memorial crosses would see a Latin cross—an obvious and widely recognized symbol of Christianity—with the conspicuous UHP "beehive" logo, but no context or history that conveys anything but a message of government endorsement of the Christian religion.[15] Far from "convey[ing] a predominantly secular message,"

---

[15] The Tenth Circuit did not, contrary to UHPA's suggestion, limit the reasonable observer to "what a passing motorist" would know. UHPA Pet. 29 n.10. The court merely concluded that the troopers' names and biographical information were of so marginal salience that they could not detract from the overall message of religious endorsement. See *Stone* v. *Graham*, 449 U.S. 39, 41 (1980) (per curiam) ("notation in small print" under "display of the Ten Commandments" was "not sufficient to avoid conflict with the First Amendment").

Van Orden, 545 U.S. at 702 (Breyer, J., concurring), the principal message that the crosses convey is that the State memorializes fallen UHP troopers with a *Christian* symbol. Nothing in the record supports petitioners' contention that 12-foot tall, permanent, State-approved Latin crosses along roadsides—much less on the front lawn of police stations—have acquired a secular meaning as a universal symbol of remembrance. That crosses *may* sometimes be used as secular markers does not mean that *these* crosses do not convey a message of religious endorsement. Compare *Salazar*, 130 S. Ct. at 1820 (plurality op.) with *Trunk*, 629 F.3d at 1111-15.

Furthermore, as the decision below points out—and as petitioners fail to address—there is no evidence that any other state has ever allowed massive, Latin crosses bearing the official insignia of a state entity to be permanently erected on roadsides or in front of public buildings. Pet. App. 34a; cf. *Cnty. of Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in part and dissenting in part) (There is no doubt that the "the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall."). Utah stands alone in this regard. See *supra* at pp. 18-19 & Appendix F. And because the State allows only the use of a Latin cross and no other memorial symbol, the memorials might well lead "observers to believe that the City has chosen to honor only Christian" UHP troopers. *Separation of Church & State Comm.*, 93 F.3d at 626 (O'Scannlain, J., concurring).

In view of all this, the panel correctly concluded that the Utah memorial crosses, considered in context, have the impermissible effect of conveying to a reasonable observer that Utah endorses Christianity.

D. Finally, petitioners repeatedly suggest that the decision below conflicts with *Salazar*. Davenport Pet. 3, 30; UHPA Pet. 11, 25-26. Not so. The *Salazar* Court did not reach the merits of the Establishment Clause challenge to the cross at issue and, instead, addressed only what remedy was warranted in light of the government's subsequent transfer of the land on which it stood. See 130 S. Ct. 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). Moreover, *Salazar* did not produce a controlling opinion of the Court.

In any event, even the plurality opinion did not purport to decide that a Latin cross serving as a roadside memorial *never* conveys a message of government endorsement of religion under any circumstances. The plurality noted only that such a cross "need not be taken as a statement of governmental support for sectarian beliefs" and stressed that the propriety of a display cannot be "divorced from its background and context." *Id.* at 1818, 1820 (internal quotation marks omitted). As the decision below explains, *these* crosses—12-foot-tall, standalone Latin crosses bearing the official UHP insignia and prominently displayed along roadways and in front of the UHP office—*would* in context be taken by a reasonable observer as conveying just such a message of religious endorsement, particularly given the State's insistence on the Latin-cross shape.

IV. This Court Should Not Jettison The *Lemon* Test, And Certainly Not In This Case.

The Davenport petitioners urge the Court to "set aside the 'endorsement test'" in favor of an Establishment Clause test based upon the notion of "coercion." Davenport Pet. i, 19-22.

This, too, is not a compelling reason to grant certiorari. This Court previously considered the question less than six years ago in *McCreary County* and specifically reaffirmed *Lemon*'s continued validity. 545 U.S. at 859, 866. And the Court has repeatedly rejected similar calls to jettison *Lemon* since then.[16] The Court should do the same here. Petitioners have not presented any "special justification," *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000), for disturbing the *Lemon* test, which, for all of the misgivings that have been expressed about it, has withstood the test of time.

Abandoning the *Lemon* test in favor of, *e.g.*, a "coercion" standard, would require the court to overturn scores of cases and leave Establishment Clause doctrine in disarray. See, *e.g.*, *Lee* v. *Weisman*, 505 U.S. 577, 587 (1992) ("we do not accept the invitation … to reconsider … *Lemon*"); *Cnty. of Allegheny*, 492 U.S. at 597 n.47 ("[T]his Court repeatedly has stated that 'proof of coercion' is 'not a necessary element of any claim under the Establishment Clause.'"); *Comm. for Pub. Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 786 (1973) (rejecting coercion standard); *Abington Sch. Dist.* v. *Schempp*, 374 U.S. 203, 223 (1963) (same); *Engel* v. *Vitale*, 370 U.S. 421, 430 (1962) (same). And it would not reduce the need for courts to engage in nuanced, fact-specific analysis

---

[16] *E.g.*, Pet. i, *Catholic League for Religious & Civil Rights v. City of San Francisco*, No. 10-1034, 2011 WL 567496, *cert. denied*, 131 S. Ct. 2875 (2011); Pet. i, *McCreary Cnty. v. ACLU of Ky.*, No. 10-566, 2010 WL 4314343, *cert. denied*, 131 S. Ct. 1474 (2011); Pet. 32, *Borden v. Sch. Dist.*, No. 08-482, 2008 WL 4600060, *cert. denied*, 129 S. Ct. 1524 (2009); Pet. 19, *Vasquez v. Los Angeles Cnty.*, No. 07-427, 2007 WL 3322291, *cert. denied*, 552 U.S. 1062 (2007).

and difficult line-drawing. For example, while the *Van Orden* plurality did not follow *Lemon*, it nevertheless employed a distinctly contextual approach (notably *not* a coercion standard), explaining that its "analysis [was] driven both by the nature of the monument and by our Nation's history." 545 U.S. at 686 (plurality opinion).

In contrast to the history and tradition of Ten Commandments displays (and other symbolic recognitions of the civic role of religion in American history) discussed by the *Van Orden* plurality, there is no U.S. historical precedent for the erection of large, standalone Latin crosses along public roads and in front of public buildings (to commemorate police officers or otherwise). The historical record of the founding period yields no descriptions or discussions of roadside memorials, and nineteenth-century sources attest to their existence only in *other* countries.[17] And when roadside crosses to commemorate the dead began to appear in the mid- to late-nineteenth century, the context was geographically and culturally unique—Hispanic settlements in the southwest, areas that later became Texas, New Mexico, Arizona, and California. See Holly Everett, *Roadside Crosses and Memorial Complexes in Texas*, 111 FOLKLORE 91, 91 (2009). Even then, however,

---

[17] Erection of roadside crosses was common in Western Europe during the eighteenth and nineteenth centuries, but there is no documentation of a comparable historic tradition in the United States. See John Holland, CRUCIANA 175-93 (London, Hamilton, Adams, & Co. 1835); cf. *Symbolism of the Cross*, Semi-Weekly Louisianian (New Orleans), Oct. 1, 1871, at 1 (noting that "*in many countries* it is very common to see large crosses erected in places of public concourse" and citing a wayside cross in England as illustrative (emphasis added)).

memorial crosses were traditionally small, crude affairs, often nothing more than a pair of sticks bound together in cruciform.[18] The historic practice is thus a far cry from the crosses at issue here: 12-feet-tall, permanent structures erected with the State's blessing and conspicuously emblazoned with one of its official emblems.

Further, even were coercion deemed to be the touchstone of an Establishment Clause violation, the Court's scrutiny could not be limited to cases of *direct* coercion. Petitioners embrace the coercion test articulated in Justice Kennedy's *County of Allegheny* opinion. Davenport Pet. 21. But that opinion left "no doubt" that governmental conduct that is "coercive in an *indirect* manner" still would be unconstitutional. 492 U.S. at 661 n.1 (Kennedy, J., concurring in part and dissenting in part; emphasis added).

This case is a particularly inappropriate vehicle to explore the boundaries of "indirect" forms of coercion. Besides the "obtrusive year-round" display of the Utah memorial crosses, there is the fact that the State allows permanent memorial displays of one religious symbol, but not the symbols of other religious groups, which raises the disturbing specter of religious preference in favor of a particular religion. *Cnty. of Allegheny*, 492 U.S. at 661; see also *id.* at 605 ("[T]he Establishment Clause … certainly means at

---

[18] *E.g.*, SUSAN SHELBY MAGOFFIN, DOWN THE SANTA FE TRAIL AND INTO MEXICO 203 (1982) (Feb. 12, 1847 diary entry noting "rude cross"); *Account of the Journey to the Salines, the Xumanas, and the Sea, 1599*, *in* 17 SPANISH EXPLORATION IN THE SOUTHWEST, 1542-1706, at 233, 235 (Herbert Eugene Bolton ed. 1916) (describing native crosses as consisting of "small sticks painted with different colors, and turkey feathers").

the very least that government may not demonstrate a preference for one particular sect or creed ….”). While the *UHPA* has suggested that it would provide a symbol other than a cross if requested by a family, the State—which has the ultimate authority over the matter—explicitly told the district court and the Tenth Circuit that only a Latin cross may be used to memorialize fallen UHP officers. BIO App. 7a-15a; Davenport CA10 Ans. Br. 14-15. Petitioners tepidly try to create uncertainty about this inconvenient fact (Davenport Pet. 3 n.2), but there is no escaping that they are asking the Court to forge new jurisprudential ground on the basis of a materially incorrect premise.

V. The *Summum* Issue Does Not Warrant Review.

Finally, UHPA (but not the Davenport petitioners) asks the Court to grant review to address whether the Tenth Circuit properly applied this Court’s recent decision in *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 129 S. Ct. 1125 (2009). UHPA does not even pretend that there is a circuit split on that issue. Further, the Tenth Circuit’s determination that the Utah memorial crosses are government speech under *Summum* is correct and does not warrant review.

A. UHPA makes much of the State’s purported “disclaimer.” UHPA Pet. 33-34. But even putting aside the fact that the “disclaimer” is nowhere to be seen on the crosses, and that, so far as the record appears, it was issued in connection with the permit approval for only one cross, the State’s actions speak louder that its words. Nobody could reasonably think that the crosses occupy their “location[s] without the support and approval of the government.” *Cnty. of*

Allegheny, 492 U.S. at 599-600. As in *Summum*, the State has "effective[] control[]" over the messages sent by the crosses because it exercises "final approval authority" over their placement and retention. 129 S. Ct. at 1134. The State does not open up its roadsides "for the placement of whatever permanent monuments might be offered by private donors." See *ibid.* "[T]he record in this case demonstrates" that "the State tightly controls the displays placed on the rights-of-way near its roads." Pet. App. 18a n.8. For example, private memorials are forbidden as a matter of UDOT policy within the right-of-way of any Utah highway, CA10 App. 2272, 2281, so the State had to approve the location of each of the roadside crosses. *E.g.*, CA10 App. 2279.

Likewise, the State controls what may be placed on the front lawns of UHP offices. As the Court pointedly observed in *Summum*, "[i]t 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." 129 S. Ct. at 1133. The State has even affirmed that it would "make every effort to accommodate the crosses at another location" on the UHP site if it needed the land on which they stood for another purpose. BIO App. 6a. In sum, the crosses are allowed to occupy privileged locations and use UHPA's official insignia at the State's sufferance. They have the "support and approval of the government." *Cnty. of Allegheny*, 492 U.S. at 599-600.

B. UHPA points out that three of the crosses are on private land. UHPA Pet. 34. But any arguments based on this factual quibble were neither pressed nor decided below and thus are waived. Pet. App. 15a n.7 ("Although it appears that at least one memorial

is located on private land, the UHPA does not base its argument on that fact."). In any event, it makes no constitutional difference. The State gave UHPA permission to use UHP's official symbol on these crosses. And there is nothing but UHPA's *ipse dixit* for the notion that the presence of *some* crosses on private land should somehow free *other* crosses on public land from Establishment Clause scrutiny.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

BRIAN M. BARNARD
Counsel of Record
Utah Civil Rights & Liberties Foundation
214 East 5th South St.
Salt Lake City, UT 84111
801-328-9531
officemanager@utahlegalclinic.com

EDWIN F. KAGIN
American Atheists, Inc.
P.O. Box 666
Union, KY 41091
859-384-7000

Counsel for Respondents

JULY 2011

APPENDICES

APPENDIX A

PHOTOGRAPHS OF THE UTAH MEMORIAL CROSSES

(CA10 App. 449)

(CA10 App. 451)

(CA10 App. 452)

(CA10 App. 462)

(CA10 App. 698)

(CA10 App. 700)

APPENDIX B

APPROVAL LETTER FOR CROSSES IN FRONT OF UHP OFFICE (CA10 APP. 2260)

[SEAL]	STATE OF UTAH
Michael O. Leavitt Governor	Division of Facilities Construction & Management
Raylene G. Ireland Executive Director	Department of Administrative Services
Richard E. Byfeld, AIA Director	4110 State Office Building Salt Lake City, Utah 84114 Phone: (801) 538-3018 Fax: (801) 538-3267

September 25, 2000

Mr. Lee Perry
Memorial Cross Coordinator
Utah Highway Patrol Association
P.O. Box 1135
West Jordan, Utah 84084

Re: Request to Place Memorial Crosses
on DFCM Property
5770 South 320 West
Murray, Utah

Dear Mr. Perry:

This letter is in response to the request from the Utah Highway Patrol Association (UHPA) to place

two memorial crosses on property owned by DFCM located at 5770 South 320 West in Murray, Utah. The exact location will be immediately west of the existing gas pumps in a grassy area with pine trees on it. The purpose of the memorial crosses is to remember two officers who were killed in the line of duty.

Please consider this letter as approval of your request and authorization to proceed. This approval is conditioned on the UHPA using the U.S.D.O.T. approved breakaway bases for the crosses. In the event this parcel of land is needed in the future for State purposes, then DFCM will make every effort to accommodate the crosses at another location on the property. Additionally, please consider this letter as approval to continue to use this site for future memorial crosses.

DFCM is pleased to be able to make this property available to UHPA for this very worthwhile cause.

Sincerely,
[signature]
Alyn C. Lunceford
Real Estate and Debt Manager

cc: Doug Fullmer
Dave Mckay
Bob Woodhead
Ken Frank
Captain Ken Bryant

APPENDIX C

TRANSCRIPT OF SUMMARY JUDGMENT HEARING HELD ON NOVEMBER 13, 2007 (CA10 APP. 2919-20, 2954)

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

AMERICAN ATHEISTS, INC., et al.,
Plaintiffs,

vs.

COLONEL LANCE DAVENPORT, et al.,
Defendants,

UTAH HIGHWAY PATROL ASSOCIATION,
Intervenor-Defendant.

Case No. 2:05-CV-994 DSS

BEFORE THE HONORABLE DAVID S. SAM
DATE: NOVEMBER 13, 2007
REPORTER'S TRANSCRIPT OF PROCEEDINGS
MOTION HEARING

Reporter: REBECCA JANKE, CSR, RMR

[2] APPEARANCES:

FOR THE PLAINTIFF: UTAH LEGAL CLINIC
BY: BRIAN M. BARNARD,

	ESQ. 214 EAST 500 SOUTH SALT LAKE CITY, UTAH 84111
FOR THE DEFENDANT:	UTAH ATTORNEY GENERAL'S OFFICE BY: THOMAS D. ROBERTS, ESQ. 160 EAST 300 SOUTH SALT LAKE CITY, UTAH 84111
FOR THE INTERVENOR-DEFENDANT:	ALLIANCE DEFENSE FUND BY: BRYON J. BABIONE, ESQ. 15333 N. PIMA ROAD SUITE 165 SCOTTSDALE, ARIZONA 85260

* * * *

[36] * * * *

THE COURT: Which I think are very appropriate purposes, but I still ask the question: If the Utah Highway patrolman who was of the Jewish faith was killed in the line of duty, how would that be presented?

MR. ROBERTS: That would be represented, Your Honor. Every trooper who dies is represented with a memorial, the same memorial.

THE COURT: The shape of a cross?

MR. ROBERTS: It has the shape of a cross. * * * *

APPENDIX D

STATE DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO AMEND OR ALTER OR TO CLARIFY MEMORANDUM DECISION (CA10 APP. 3030-31)

* * * *

The State Defendants are requesting that the Court alter or amend or clarify its Memorandum Decision it to reflect the State's response and position with regard to such a change. In addition to the statement made by counsel at the hearing, filed in support of this Motion and Memorandum, is an Affidavit which contains letters sent by the State Defendants concerning the issue. Each of the State Defendants indicates that if UHPA were to change the shape of the trooper memorial to the shape of the symbol of the religion of the fallen trooper that such would be a significant change in the trooper memorial program. Further, since the memorial would no longer be in the shape of a secular symbol of death, and would not continue to be a symbol that is recognized as someone having died near that spot, that the State Defendants and agencies would not be able to approve the new memorial in the same manner that they had for the prior memorials in the shape of a cross.

* * * *

APPENDIX E

LETTERS FROM STATE DEFENDANTS JOHN R. NJORD, DAVID G. BUXTON, AND COLONEL D. LANCE DAVENPORT TO UHPA (CA10 APP. 3036-40)

[SEAL]
STATE OF UTAH

JON M. HUNTSMAN, JR.
Governor

GARY R. HERBERT
Lieutenant Governor

DEPARTMENT OF
TRANSPORTATION

JOHN R. NJORD, P.E.
Executive Director

CARLOS M. BRACERAS, P.E.
Deputy Director

December 10, 2007

Utah Highway Patrol Association
c/o Mr. Byron J. Babione
Alliance Defense Fund
15333 North Pima Road, Suite 165
Scottsdale, AZ 85260

Dear Mr. Babione:

RE: UHPA MEMORIALS ON
STATE PROPERTY RELIGIOUS
ACCOMMODATION

This letter is sent to resolve a question that arose during the argument for summary judgment in the American Atheists, et al. v. Davenport, et al. This represents an official response from my agency.

At the hearing apparently Judge Sam asked both our counsel, Mr. Thom Roberts, Assistant Utah At-

torney General, and you on behalf of Utah Highway Patrol Association (UHPA), what would happen if a trooper died in the line of duty and requested that UHPA do a memorial in the shape if the trooper's religious symbol rather than in the shape of a cross. Mr. Roberts indicated that such a change would not be allowed while you indicated on behalf of UHPA that you would accommodate that request and construct a memorial in the shape of that religious symbol[.]

This is to advise you that if you were to change the shape of the memorial to reflect the religious symbol of the fallen trooper, rather than the shape of the cross, the memorial would no longer be a secular shape recognized as a symbol of death nor a symbol that someone died near the spot. Further, it would not be recognized as such by a person merely travelling down the highway. Therefore it would constitute a significant change in the fallen trooper memorial program and this agency would not be able to approve the memorial for placement on public properly in the same manner that it had for the prior memorials in the shape of a cross.

If you have any further questions about this matter. Please feel free to contact our counsel in this matter, Mr. Thom D. Roberts.

Sincerely,
[signature]
John R. Njord, P.E.
Executive Director

TDR/slc/dej

[SEAL]
STATE OF UTAH

JON M. HUNTSMAN, JR.
Governor

GARY R. HERBERT
Lieutenant Governor

DEPARTMENT OF
ADMINISTRATIVE SERVICES

KIMBERLY K. HOOD
Executive Director

Division of Facilities
Construction and Management

DAVID G. BUXTON
Deputy Director

December 4, 2007

Utah Highway Patrol Association
c/o Byron J. Babione
Alliance Defense Fund
15333 N. Pima Road, Suite 165
Scottsdale, AZ 85260

RE: UHPA TROOPER MEMORIALS ON STATE PROPERTY
RELIGIOUS ACCOMMODATION

Dear Mr. Babione:

This letter is sent to resolve a question that arose during the argument for summary judgment in the American Atheists, et al. v. Davenport, et al. This represents an official response from my agency.

At the hearing apparently Judge Sam asked both our counsel, Mr. Thom Roberts, Assistant Utah Attorney General, and you on behalf of Utah Highway Patrol Association (UHPA), what would happen if a trooper died in the line of duty and requested that UHPA do a memorial in the shape if the trooper's religious symbol rather than in the shape of a cross.

Mr. Roberts indicated that such a change would not be allowed while you indicated on behalf of UHPA that you would accommodate that request and construct a memorial in the shape of that religious symbol[.]

This is to advise you that if you were to change the shape of the trooper memorial to reflect the religious symbol of the fallen trooper, rather than the shape of the cross, the memorial would no longer be a secular shape recognized as a symbol of death nor a symbol that someone died near the spot. Further, it would not be recognized as such by a person merely travelling down the highway. Therefore it would constitute a significant change in the fallen trooper memorial program and this agency would not be able to approve the memorial for placement on public properly in the same manner that it had for the prior memorials in the shape of a cross.

If you have any further questions about this matter. Please feel free to contact our counsel in this matter, Mr. Thom D. Roberts.

Sincerely,
[signature]
David G. Buxton

TDR/slc

[SEAL]
STATE OF UTAH

JON M. HUNTSMAN, JR.
Governor

GARY R. HERBERT
Lieutenant Governor

UTAH HIGHWAY PATROL

COLONEL D. LANCE
DAVENPORT
Superintendent

December 7, 2007

Utah Highway Patrol Association
c/o Byron J. Babione
Alliance Defense Fund
15333 N. Pima Road, Suite 165
Scottsdale, AZ 85260

RE: UHPA MEMORIALS ON
STATE PROPERTY RELIGIOUS
ACCOMMODATION

Dear Mr. Babione:

This letter is sent to resolve a question that arose during the argument for summary judgment in the American Atheists, et al. v. Davenport, et al. This represents an official response from my agency.

At the hearing apparently Judge Sam asked both our counsel, Mr. Thom Roberts, Assistant Utah Attorney General, and you on behalf of Utah Highway Patrol Association (UHPA), what would happen if a trooper died in the line of duty and requested that UHPA do a memorial in the shape of the trooper's religious symbol rather than in the shape of a cross. Mr. Roberts indicated that such a change would not be allowed, while you indicated on behalf of UHPA

that you would accommodate that request and construct a memorial in the shape of that religious symbol

This is to advise you that if you were to change the shape of the memorial to reflect the religious symbol of the fallen trooper, rather than the shape of the cross, the memorial would no longer be a secular shape recognized as a symbol of death nor a symbol that someone died near that spot. Further, it would not be recognized as such by a person merely travelling down the highway. Therefore it would constitute a significant change in the fallen trooper memorial program and this agency would not be able to approve the memorial for placement on public properly in the same manner that it had for the prior memorials in the shape of a cross.

If you have any further questions about this matter, please feel free to contact our counsel in this matter, Mr. Thom D. Roberts.

Sincerely,
[signature]
Colonel D Lance Davenport
Superintendent

TDR/slc

APPENDIX F

SUMMARY OF THE ROADSIDE MEMORIAL LAWS OF VARIOUS ADDITIONAL STATES (BEYOND THOSE DISCUSSED IN THE TEXT)[1]

- Alabama prohibits "[s]igns" and "markers … on the rights-of-way of state controlled highways … except those official signs or markers placed thereon by the State Department of Transportation or under its authority," Ala. Code § 23-1-6, which effectively forbids any privately erected roadside memorials.
- Alaska permits only "lightweight objects or ornamentation" as private roadside memorials. Alaska Stat. Ann. § 19.25.260(g). Alaska's standardized memorial signs for drunk-driving victims do not contain a cross. Alaska DOT&PF, *Highway Fatality Memorial Signs*, http://tinyurl.com/63w74fu; see also Alaska Admin. Code tit. 17, ch. 8.
- Colorado's official state memorial signs consist entirely of text. Colo. Dep't of Transp., *Memorial Signage Program* (Feb. 2009), http://tinyurl.com/5sfdwpb. Memorials constructed by private parties are limited in size to 3' x 2' x 6". Colo. Rev. Stat. Ann. § 43-2-149(3)(a)(I), (3)(b).
- Georgia law is similar. Ga. Dep't of Transp., *GA DOT Okays Memorial Signs for Highway Fatalities* (Feb. 8, 2011), http://tinyurl.com/3mkd5cm.

[1] All websites were last visited on July 20, 2011.

- Illinois's standardized memorial sign contains the text "Please Don't Drink and Drive." 605 Ill. Comp. Stat. Ann. § 126/20(a). Relatives of the victim must "agree not to place or encourage the placement of … items at the crash site." *Id.* § 125/15(e),
- In Louisiana, "roadside memorials are encroachments on [the Department of Transportation's] right of way and are illegal." La. Dep't of Transp. & Dev., *Roadside Memorials*, http://tinyurl.com/64bfdh7.
- Missouri's standardized memorial signs read "DRUNK DRIVING VICTIM [¶] [name] [¶] [month and year of death] [¶] THINK ABOUT IT." State law forbids any "other adornment, landscaping, or modification of the sign or ground around the sign," Mo. Code Regs. Ann. tit. 7 § 10-27.030(2), (6).
- Oklahoma makes it "unlawful for any person to construct" or "maintain … any … sign, … post, or any thing or structure on … any right-of-way." Okla. Stat. Ann. tit. 69, § 1208(b). The state has the power to "summarily abate[]" such "public nuisance[s]," *ibid.*, and prosecute violations of this law as misdemeanors, *id.* § 1211(a).
- Texas's official memorial signs contain the text "PLEASE DON'T DRINK AND DRIVE [¶] IN MEMORY OF [NAME] [¶] [DATE]." Tex. Dep't of Transp., *Memorial Sign Program for Victims of Impaired Driving*, http://tinyurl.com/3qlveyy. Private memorials for fallen peace officers may be no larger than 4.5' x 2' x 6"—only a third the size of

Utah's crosses. 43 Tex. Admin. Code § 22.17(f)(2).

- West Virginia imposes a 4' x 4' size limitation on temporary memorials. W. Va. Code R. § 157-6-9(3)(a). Its official memorial signs contain no symbols. W. Va. Dep't of Transp., *Roadside Memorials*, http://tinyurl.com/65ljtqn.

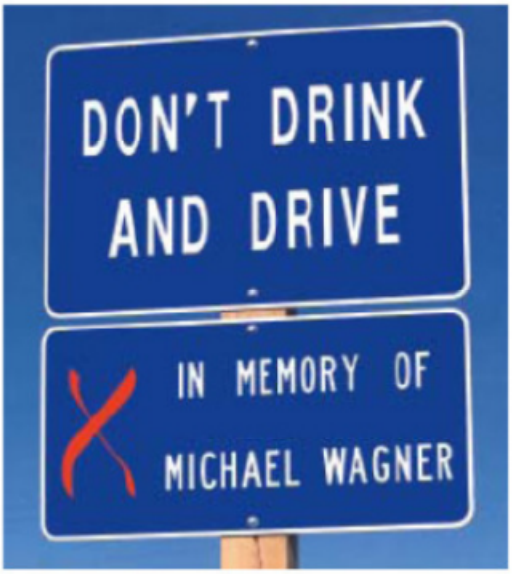
APPENDIX G

REPRESENTATIVE MEMORIALS ALLOWED UNDER OTHER STATES' LAWS[1]

Alaska (http://tinyurl.com/63w74fu)

California (http://tinyurl.com/66urb6b)

[1] All websites were last visited on July 21, 2011.



Colorado (http://tinyurl.com/5sfdwpb)

Florida (http://tinyurl.com/5w3t3g9)

Georgia (http://tinyurl.com/3mkd5cm)

Illinois (http://tinyurl.com/64dkptx)

Missouri (http://tinyurl.com/3hflogy)

New Mexico (http://tinyurl.com/64t3ot2)

Texas (http://tinyurl.com/3qlveyy)

Virginia (http://tinyurl.com/3p3k8rb)

West Virginia (http://tinyurl.com/6262a43)

Wyoming (http://tinyurl.com/6k64gjq)