

**Appeal No. 08-4061**

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

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AMERICAN ATHEISTS, ET AL.,  
*Plaintiffs-Appellants,*

vs.

DUNCAN, ET AL.,  
*Defendants-Appellees,*

UTAH HIGHWAY PATROL ASSOCIATION,  
*Intervenor-Defendant-Appellee.*

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On Appeal from the United States District Court  
for the District of Utah  
Case No. 02:05-CV-00994 DS  
(Honorable David Sam)

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**BRIEF OF UTAH HIGHWAY PATROL ASSOCIATION,  
INTERVENOR-DEFENDANT APPELLEE**

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*Oral Argument Requested  
Includes scanned PDF attachments*

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## **CORPORATE DISCLOSURE STATEMENT**

Utah Highway Patrol Association is a non-profit Utah corporation. It has no shareholders. It has members who support the corporation and its mission.

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**Prior or Related Appeal:**

None.

## **STATEMENT OF RELATED CASES**

Per 10th Cir. R. 28.2(C)(1), there are no prior or related appeals.

## **CERTIFICATE OF COUNSEL**

Per 10th Cir. R. 31.3(D), Intervener-Defendant-Appellee, UHPA, filed its own brief here since 10th Cir. R. 31.3(A)'s requirement of a joint brief for multiple parties on a side does not apply when the only other party is a government entity as is Defendants-Appellee, State of Utah. Per 10th Cir. R. 31.3(B), Appellees filed separate briefs because of their differing interests in and analysis of the issues.

## **STANDARD OF REVIEW**

This appeal arises from the grant of summary judgment for Defendants-Appellees State of Utah (State) and the Intervener-Defendant-Appellee Utah Highway Patrol Association (UHPA) and from denial of summary judgment for Plaintiffs-Appellants, American Atheists (Atheists). This Court must ensure that “there is no genuine issue as to any material fact” in dispute and that the State and the UHPA are “entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). Atheists misstate the standard of review on appeal of constitutional questions. Rather this Court engages in “independent review” of constitutional facts but engages in “*clearly erroneous*” review of historical facts upon which the claim is grounded. *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918, 922-23 (10th Cir. 2002) (emphasis added); *United States v. Friday*, 525 F.3d 938, 950 (10th Cir.

2008). Atheists bear the burden of demonstrating that the existence of the UHPA memorials is unconstitutional. *See INS v. Chadha*, 462 U.S. 919, 944 (1983).

Furthermore, Atheists' assertions notwithstanding, the district court's decision to exclude testimonial affidavits (*i.e.* exclusion of evidence) is reviewed by this Court for abuse of discretion. *Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc.*, 131 F.3d 874, 894 (10th Cir. 1997); *see also, United States v. Rice*, 52 F.3d 843, 847 (10th Cir. 1995) ("Like all evidentiary issues, the trial court has wide discretion in making these [in that case, expert testimony] determinations."). Atheists look to *Peck v. Horrocks Eng'rs, Inc.*, 106 F.3d 949, 955 (10th Cir. 1997), to support a *de novo* standard of review. To the contrary, this Court "review[ed] the district court's decision to disregard an expert witness's testimony [in *Peck*] for an *abuse of discretion*." *Id.* at 956 (emphasis added).

### **STATEMENT OF THE ISSUES**

The United States and Utah Constitutions allow private speakers to memorialize fallen public servants with memorial crosses as long as the State does not endorse or favor religion. The Utah Highway Patrol Association (UHPA), a private non-profit organization, conceived and constructed memorial crosses to honor thirteen fallen highway patrol officers. Each memorial conspicuously bears the highway patrol logo and each officer's name, badge number, date of death, photograph and narrative explaining the officer's service and death. No

government or religious entity was involved in the process. With permission from the State of Utah, the UHPA erected the memorials along Utah roadways at or near the spot where each officer was mortally injured in the line of duty. Some stand on private and others on public property. No individual or other group has asked the state for permission to erect a memorial for fallen highway patrol officers.

I. Does the First Amendment allow the state to permit the UHPA, a private speaker, to erect these memorials on public property to memorialize fallen troopers?

II. Is the Atheists' supplemental state law claim against state officials under the Utah Constitution Art. 1 § 4 barred by the Eleventh Amendment?

### **STATEMENT OF THE CASE**

UHPA is satisfied with Atheists' statement, except its claim that the state granted the UHPA *exclusive* permission to erect heroic "Roman crosses" to honor Utah Highway Patrol troopers. There is no evidence that any other individual or groups seeking to erect memorials to fallen troopers was denied permission as no others even made such a request. The memorials at issue here are distinguished from what Atheists call stark white Roman crosses. Rather the UHPA memorials uniquely and clearly display the name, badge number, date of death, biography, photo, and logo of a highway patrol officer.

## STATEMENT OF FACTS

The fallen trooper memorial project began after twenty-seven year old Trooper William J. Antoniewicz was ambushed and killed near the Utah-Wyoming border. UHPA President Lee Perry helped conceive of the memorial program after he “learned that there was nothing to memorialize the spot where Trooper Antoniewicz had made the ultimate sacrifice.” (Aplee. Supp. App. at 3164-65, ¶¶ 14, 15, 16.) The UHPA is a private, non-profit Utah corporation dedicated to “supporting Utah State Highway Patrol Officers and acknowledging those troopers’ service to the people of the State of Utah.” (Aplt. App. at 38, ¶ 15.)

After the UHPA erected two such memorials for fallen troopers, families of other fallen troopers contacted the UHPA requesting that similar memorials be erected for their lost loved ones. (Aplee. Supp. App. at 3167, ¶ 29.) The UHPA erected a total of thirteen memorial crosses to all state troopers who gave their lives in service to the people of Utah. (Aplee. Supp. App. at 3167, ¶ 33; Aplt. App. at 73; Aplee. Supp. App. at 3112, ¶ 14; Aplt. App. at 1889-1910.) Every family member contacted approved of the memorial cross as the symbol to commemorate their trooper (Aplee. Supp. App. at 3167, ¶ 29), and no family member has ever requested any symbol other than the cross as the basis of the memorial. There is absolutely no indication in the record that any family acted from a religious motivation or for a religious purpose in seeking a memorial.

Each memorial is a twelve-foot high steel cross which is painted white with large black inscription bearing the fallen trooper's name, rank, badge number, and year of death. (Aplt. App. at 155, ¶¶ 14, 15, 16, 17.) A sixteen by twelve inch Utah Highway Patrol beehive logo hangs just below the place where the arms of the cross intersect. (*Id.*) Underneath is an eight by five inch plaque showing a photograph of the fallen trooper, and a biography of the trooper stating the date he joined the force, the manner in which he served and died, the date on which he died, and the place where he was mortally injured. (Aplt. App. at 1867, 1870-78, 1880-85, ¶¶ 23, 40, 43, 48, 53, 58, 64, 69, 73, 78, 82, 89, 94, 98.) Each memorial is constructed with a "break away" base like modern traffic signs and signals for safety in the event they are hit by a vehicle. (Aplt. App. at 1868, ¶ 27.) With the State's permission, the UHPA carefully placed the memorials to communicate to passers-by that a Utah Highway Patrolman gave his life at or near the spot where the cross is located. (Aplt. App. at 1866-67, ¶¶ 24, 14.)

The UHPA designed, constructed, funded, erected and maintains the memorials. (Aplee. Supp. App. at 3167-68, ¶¶ 33, 35, 36; Aplt. App. at 39-40, ¶¶ 17, 21). The State of Utah took no part in designing or selecting the memorial crosses. (Aplt. App. at 1867, 1886, ¶¶ 24, 107.). The UHPA received no public funds for the memorial project. (Aplt. App. at 40, ¶ 21; Aplt. App. at 1886, ¶ 106.) The Utah Department of Transportation (UDOT) allowed the placement of these

memorials on state property to commemorate the loss of these troopers and to honor them. (Aplee. Supp. App. at 3167, ¶ 31; Aplt. App. at 1867, ¶ 24.)

The UHPA concluded that “only a white cross could effectively convey the simultaneous messages of death, honor, remembrance, gratitude, sacrifice, and safety . . . because a cross is internationally recognized as a memorial for a person’s death.” (Aplt. App. at 155, ¶ 10.) The UHPA chose white crosses because they are used as memorial symbols “in cemeteries particularly, Luxembourg Cemetery and Arlington National Cemetery.” (Aplt. App. at 154-55, ¶¶ 8, 9.) The UHPA further reasoned that a white cross is a time-honored and common medium for memorializing soldiers and that the fallen troopers here should be memorialized with the same high honor because each of them died in the line of duty for their fellow citizens. (Aplt. App. at 154-55, ¶ 9.)

White crosses are commonly used to mark the death of those who sacrificed their lives for their fellow citizens, community, and country. (Aplt. App. at 1021-1070; Aplt. App. at 2030-170 & 2362-67; Aplt. App. at 1922, ¶ 16.) Arlington National Cemetery, created on May 13, 1864 (Aplt. App. at 1950, ¶ 13), provides the estate of eligible persons an upright, white marble headstone or niche cover as a grave marker (Aplt. App. at 1951, ¶ 16). Approximately ninety-five percent (95%) of the headstones at Arlington National Cemetery are engraved with a Latin cross. (Aplt. App. at 1952, ¶ 26.) Additionally, there are approximately one

hundred stand alone memorial crosses in Arlington National Cemetery. (Aplt. App. at 1952, ¶ 27.) These memorial crosses commemorate the public service and sacrifice of those interred at Arlington National Cemetery. (Aplt. App. at 1952, ¶ 28.) Overseas American Military Cemeteries also use crosses to memorialize the deaths of United States service men and women. (Aplt. App. at 1021-70; Aplt. App. at 2030-170 & 2362-67.) For example, at the Normandy American Cemetery and Memorial, there are 9,387 headstones. Out of those headstones, 9,238 of them are white Latin crosses. (Aplt. App. at 2363-67.)

Memorial crosses adjacent to highways and other tragedies are also considered to serve the valuable interest of promoting public safety. (Aplt. App. at 1917, ¶¶ 9, 10, 11; Aplt. App. at 1928-29, ¶¶ 10, 11, 12, 16, 19; Aplt. App. at 1914, ¶ 38; Aplt. App. 1921, ¶10.) Roadside memorials adjacent to highways mark and communicate to drivers that someone died near the spot. (Aplt. App. at 1917, ¶¶ 9, 10, 11; Aplt. App. at 1928-29, ¶¶ 10, 11, 12, 16, 19; Aplt. App. at 1914, ¶ 38.) Roadside memorials at the scene of a fatal accident caution motorists of the dangers of the road and to drive carefully. (Aplt. App. at 1917, ¶¶ 6-9; Aplt. App. at 1928, ¶ 11.) The memorials help assuage the grief of friends and family because the memorial may help save others' lives. (Aplt. App. at 1917, ¶¶ 6-9; Aplt. App. at 1929, ¶ 13.) Memorials erected near the scene of a fatal accident are used to

facilitate investigations and improvements to highway safety. (Aplt. App. at 1918, ¶ 13; Aplt. App. at 1929, ¶ 15.)

### SUMMARY OF ARGUMENT

The UHPA memorials are private speech, and as such, they cannot violate the Establishment Clause. *See Sumnum v. Pleasant Grove City*, 483 F.3d 1044, 1048 (10th Cir. 2007), *cert. granted*, 128 S. Ct. 1737 (2008). The State had no involvement in creating and constructing the crosses. The undisputed proof shows that a private organization chose and adorned a cross-shape memorial to speak in honor of fallen highway patrol officers.

Furthermore, the State's actions in permitting the UHPA to display the memorials were not intended to, nor do they in fact, endorse religion. *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1224 (10th Cir. 2005). Nothing in the record suggests to the reasonable observer that the State's secular purpose in allowing a private service organization to honor the service of fallen troopers and to communicate highway safety is a sham cover to promote religion. *Weinbaum v. City of Las Cruces, N.M.*, 541 F.3d 1017, 1035-36 (10th Cir. 2008). Also, cognizant of the memorials' purpose, context, and history, the objective observer would recognize that the memorials do not have the effect of endorsing Christianity. *Id.* at 1037.

One need not strain to think that a passing motorist, seeing the combination of cross, trooper's name, badge, and a narrative of his death would conclude that this memorialized a fallen officer. The identifying features clearly signal that the memorials honor specific fallen public servants. Joined with the cross shape, the memorials are common, historical and cultural symbols that exhort the reasonable observer to remember selfless public service. *Marsh v. Chambers*, 463 U.S. 783 (1983); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Trunk v. San Diego*, 568 F. Supp. 2d 1199, 2008 WL 2917123, at \*21 (S.D. Cal. 2008). On the undisputed record, the State's allowance of these private memorials to fallen public servants does not come close to running afoul of the Establishment Clause. The district court correctly determined there were no genuine issues preventing summary judgment in UHPA's favor.

Finally, the declarations of O. Salah and Deen K. Chatterjee opine, without any personal knowledge whatsoever of the memorial crosses, that Latin crosses are inescapably religious. Their opinions about abstract Latin crosses are not helpful to any matter here because this case involves uniquely adorned memorials to Utah Highway Patrol officers. And both declarations violated the district court's order and applicable motion rules because they were not identified with any particular motion and were not filed with any motion. Finally, the Chatterjee declaration was an untimely attempt to present expert evidence. The district court was within its

sound discretion when it struck the declarations.

Applying the applicable standards and law to the undisputed record, all Atheists' claims fail, and the district court's judgments should be affirmed.

## ARGUMENT

### I. THE FIRST AMENDMENT ALLOWS A PRIVATE SPEAKER TO ERECT MEMORIALS ON PUBLIC PROPERTY TO MEMORIALIZE FALLEN TROOPERS

#### A. UHPA's Memorials Clearly Pass the Endorsement Test and Do Not Violate the Establishment Clause.

The Establishment Clause of the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. Amend I. This prohibition is applied to the states through the Fourteenth Amendment.<sup>1</sup> *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947). But the U.S. Supreme Court has rejected "a rigid, absolutist view of the Establishment Clause," choosing instead to scrutinize whether the challenged official conduct, in reality, "establishes a religion or religious faith, or tends to do so." *Lynch v. Donnelly*, 465

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<sup>1</sup> Note that several justices of the Supreme Court reject the "incorporation" of the Establishment Clause against the States because it was originally adopted to protect the States (and their citizens) from "the imposition of an established religion by the Federal Government." *Zelman v. Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., Concurring) (citing *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 309-10 (1963) (Stewart, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting)). See also *Lee v. Weisman*, 505 U.S. 577, 641-42 (1992) (Scalia, J., dissenting); *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 50-51 (2004) (Thomas, J., concurring); *Cutter v. Wilkinson*, 544 U.S. 709, 726-29 (2005) (Thomas, J., concurring).

U.S. 668, 678 (1984).<sup>2</sup> The Sixth Circuit has noted that the mantra “separation of church and state” is an “extra-constitutional construct [that] has grown tiresome. The First Amendment does not demand a wall of separation between church and state.” *ACLU v. Mercer County*, 432 F.3d 624, 638 (6th Cir. 2005) (upholding Ten Commandments display). The State has not endorsed religion by allowing the UHPA to erect cross-shaped memorials to fallen troopers where they fell serving their communities.

**1. UHPA’s memorials are private speech that cannot violate the Establishment Clause.**

Atheists’ Establishment Clause challenge must fail because the memorial crosses are private speech and the Establishment Clause generally applies only to government speech and conduct. There is a crucial distinction between government speech endorsing religion and private speech which is protected by the free speech and free exercise clauses. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 765 (1995). UHPA’s speech is clearly private under the Tenth Circuit’s test to determine whether challenged speech is government speech: (1) whether the central purpose of the speech at issue was to promote the views of

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<sup>2</sup> Atheists’ claims also must be dismissed because 42 U.S.C. § 1983, and its jurisdictional counterpart 28 U.S.C. § 1343, do not provide jurisdiction for an Establishment Clause claim. In *Cammack v. Waihee*, the Ninth Circuit noted that the question whether Establishment Clause claims can be brought under 42 U.S.C. § 1983 has not been considered by the Supreme Court. 932 F.2d 765, 768 n.3 (9th Cir. 1991). The Ninth Circuit left it an open question because the parties did not directly raise it. *Id.*

the government; (2) whether the government exercised control over the speech at issue; (3) whether the literal speaker was an employee of the government and not a private speaker; and (4) whether ultimate responsibility for the speech content rested with the government. *See e.g. Wells v. City and County of Denver*, 257 F.3d 1132, 1140-41 (10th Cir. 2001); *Sumnum v. City of Ogden*, 297 F.3d 995, 1004 (10th Cir. 2002). This Court properly recognizes that a private display containing an express religious message erected on public property is protected, private expression. *See Sumnum v. Pleasant Grove City*, 483 F.3d 1044, 1048 n.2 (10th Cir. 2007), *cert. granted*, 128 S. Ct. 1737 (2008) (Fraternal Order of Eagles Ten Commandments monument donated by and placed by the city on public property is “the private speech of the Eagles rather than that of the city.”) (citing *City of Ogden*, 297 F.3d at 1006; *Sumnum v. Callaghan*, 130 F.3d 906, 913 (10th Cir. 1997)).

The analysis here is not complex: the memorials are the private speech of the UHPA memorializing fallen troopers; it cannot be government speech and is thus not promoting the government’s views. (*See* Aplt. App. at 1865-67, ¶¶ 7-24; Aplt. App. at 39-40, ¶ 17.) The UHPA is not an employee or arm of the state; it is a private non-profit corporation. (Aplt. App. at 38, ¶ 15.) Atheists, as well as individual members, admit they have no evidence that the State exercised any control over the message displayed on and through the memorials. They have no

evidence that the State of Utah funded, created or constructed the memorials. (Aplt. App. at 1341; Aplt. App. at 1119; Aplt. App. at 1440; Aplt. App. at 1616,; Aplt. App. at 1713, 1721; Aplt. App. at 1793, American Atheists Ans. First Set of Disc. Reqs., Ans. No. 1; Aplt. App. at 1806, Rivers Ans. First Set of Disc. Reqs., Ans. No. 1.) And they have no evidence that any Utah State official, acting in his official capacity, ordered or directed the design or construction of these memorials. (Aplt. App. at 1341-42; Aplt. App. at 1119; Aplt. App. at 1530-31; Aplt. App. at 1439; Aplt. App. at 1616; Aplt. App. at 1721; Aplt. App. at 1793, American Atheists Ans. First Set of Disc. Reqs., Ans. No. 1; Aplt. App. at 1806, Rivers Ans. First Set of Disc. Reqs., Ans. No. 1.)

While Atheists' material points are completely unsubstantiated by any evidence, UHPA's positions are uniformly supported by substantive, credible evidence. Atheists' Complaint admits that UHPA's speech is truly private. (*See* Aplt. App. at 38, ¶ 15 (UHPA is a private association); Aplt. App. at 39, ¶ 17 (UHPA erected memorials); Aplt. App. at 40, ¶ 21 (UHPA paid for creation and erection of memorials).) The undisputed proof affirms that the UHPA conceived of the memorial project, and all of the memorials have been built, erected and maintained by the UHPA using its own funds and donations of material and labor from private volunteers. (Aplee. Supp. App. at 3114, ¶ 27; Aplee. Supp. App. at

3163, 3167-68, ¶¶ 12, 33, 35, 36; Aplt. App. at 170, ¶ 82; Aplt. App. at 1865, 1886, ¶¶ 7, 108; Aplt. App. at 40, ¶ 21.)<sup>3</sup>

The UHPA, and not the State, is responsible for the speech displayed on and through the memorials. Thus under *Wells*, the UHPA’s speech is that of a private speaker and cannot violate the Establishment Clause.

**2. The Reasonable Observer Knows that the UHPA Memorials Endorse Fallen Troopers, Not Religion.**

Allowing the UHPA to display its memorials fully satisfies the Establishment Clause test under *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).<sup>4</sup> Government action permitting private speech satisfies the Establishment Clause if doing so (1) has a secular purpose, (2) does not have the principal or primary effect of advancing or inhibiting religion, and (3) does not foster an excessive entanglement of government and religion. *Id.* In evaluating

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<sup>3</sup> Several local businesses have supported the memorials by donating labor, materials, and/or expertise to assist the UHPA in their efforts to acknowledge these heroic fallen troopers. (Aplee. Supp. App. at 3166, ¶¶ 23, 24.)

<sup>4</sup> The Supreme Court has recently indicated that *Lemon* is not useful when dealing with *passive* religious monuments on state property. Instead, the Court’s “analysis is driven both by the nature of the monument and by our Nation’s history . . . of official acknowledgment by all three branches of government of the role of religion in American life.” *Van Orden v. Perry*, 545 U.S. 677, 686 (2005). *See infra* Point I.B. But because *Van Orden* did not expressly overrule *Lemon*, this Court has stated that it will continue to apply a refined version of *Lemon* (i.e. the “endorsement test”) to public displays alleging a religious dimension. *See O’Connor v. Washburn Univ.*, 416 F.3d 1216, 1224 (10th Cir. 2005).

Establishment Clause claims involving public displays, this Court applies a modified version of the *Lemon* test, known as the “endorsement test.” Under this *Lemon*/endorsement test, no Establishment Clause violation occurs unless the government (not the private speaker) “has either (1) the purpose or (2) the effect of conveying a message that religion or a particular religious belief is favored or preferred.” *O’Connor v. Washburn Univ.*, 416 F.3d 1216, 1224 (10th Cir. 2005). Only if the government involves itself with a religious institution does *Lemon*’s excessive entanglement prong come into play. *Weinbaum v. City of Las Cruces, N.M.*, 541 F.3d 1017, 1030-31 (10th Cir. 2008). To determine the first two prongs, the Court asks whether a reasonable observer “would view the practice as communicating a message of government endorsement.” *Bauchman v. West High Sch.*, 132 F.3d 542, 552 (10th Cir. 1997) (holding a school did not communicate endorsement of religion by incorporating religious music and performances at religious venues into high school choral program).

The ““endorsement inquiry is not about the perceptions of particular individuals or saving isolated non-adherents from the discomfort of viewing symbols of faith to which they do not subscribe.’ It is instead an objective inquiry . . . .” *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) (citations omitted) (finding historical use and ubiquity of “In God We Trust” on U.S. currency could not be reasonably understood to convey government approval of

religious belief). Thus, the reasonable observer is not an “eggshell plaintiff” but is “kin to the fictitious ‘reasonably prudent person’ of tort law.” *Weinbaum*, 541 F.3d at 1031. The Court does *not* examine “whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the government] endorses religion.” *Pinette*, 515 U.S. at 780 (O’Connor, J., concurring in part and concurring in the judgment) (internal quotation marks and citations omitted). The subjective “reactions of individual viewers” are not imputed to the perception of the reasonable observer. *O’Connor*, 416 F.3d at 1231 n.7. *Accord Gaylor*, 74 F.3d at 217. Rather the reasonable observer “takes account of the traditional external signs that show up in the ‘text, legislative history, and implementation of the statute,’ or comparable official act.” *Weinbaum*, 541 F.3d at 1031 (quoting *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005)); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) and *O’Connor*, 416 F.3d at 1224-25. The objective observer is “presumed to be familiar with the history of the government’s actions and competent to learn what history has to show.” *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005).

Evaluating “a particular religious display depends in large part on the display’s particular physical setting.” *O’Connor*, 416 F.3d at 1228; *Lynch*, 465

U.S. at 694. But “the awareness of this reasonable observer is not limited to ‘the information gleaned simply from viewing the challenged display.’” *O’Connor*, 416 F.3d at 1228 (quoting *Wells*, 257 F.3d at 1142-43). Instead, the “history and ubiquity” of a practice also provides context for evaluating whether a challenged practice endorses religion. *Pinette*, 515 U.S. at 780; *Weinbaum*, 541 F.3d at 1031.

In our case, the reasonable observer knows this is private speech by a private association expressing a private secular memorial message. Moreover, the reasonable observer knows that the practice of memorializing roadside deaths by crosses is widespread if not ubiquitous. (Aplt. App. at 1921, ¶¶ 8-10; Aplt. App. at 1928, ¶ 10; Aplt. App. at 1917, ¶ 7; Aplt. App. at 1866, ¶¶12-13; Aplt. App. at 1946, ¶ 6.) Likewise, the reasonable observer knows that memorial crosses are commonly employed to mark the death of those who served and died for community and country. (Aplt. App. at 1949-62; Aplt. App. at 2027-2170, 2362-2367.) And the reasonable observer would know that for Christians, it would be blasphemy to ascribe religious devotion or worship to these memorial crosses because they represent a fallen Trooper, not Jesus Christ. No reasonable, objective observer would conclude that these private memorials, displayed in a limited, non-public forum are a government endorsement of religion.

**a. The State’s allowance of the memorials serves the secular purposes of memorializing fallen troopers and promoting highway safety.<sup>5</sup>**

“The Constitution does not require that the purpose of every government-sanctioned activity be unrelated to religion.” *Bauchman*, 132 F.3d at 553 (citing *Wallace v. Jaffree*, 472 U.S. 38, 64 (1985)). The court’s inquiry is “‘deferential and limited’” and “should resist attributing unconstitutional motives to the government, particularly where we can discern a plausible secular purpose.” *Id.* at 554 (citation omitted). Regarding monuments, even “[t]he Government may depict objects with a spiritual content,” if it does not “‘give its stamp of approval to such spiritual content.’” *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 32 (10th Cir. 1973) (quoting *Allen v. Hickel*, 424 F.2d 944, 948 (D.C. Cir. 1970)). Here, the government is not even the party presenting the memorial, and there is no evidence in the record that “the defendants’ ‘actual’ purpose is to endorse or disapprove of religion.”<sup>6</sup> *See Bauchman*, 132 F.3d at 554.

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<sup>5</sup> Although Atheists challenge the State’s purpose in their appellate brief, they never alleged it below. (*See* Aplt. App. at 34-43.) Atheists only alleged that the memorials have “a *primary effect* to advance religion . . . .” (Aplt. App. at 40, ¶ 23 (emphasis added).) As shown, however, even if American Atheists had raised impermissible purpose, they cannot prevail.

<sup>6</sup> It is not necessary that purely secular means for memorializing the fallen troopers are “wholly unavailing” to justify the use of religious means. That is, “‘it is ‘irrelevant’ that these [secular] objectives could have been accomplished by some less intrusive or controversial means.’” *Friedman v. Bd. of County Comm’rs of Bernalillo County*, 781 F.2d 777, 789 n.2 (10th Cir. 1985) (citations omitted).

A violation may be found only with concrete evidence of an impermissible purpose. For example, in *Gonzales v. North Township of Lake County*, 4 F.3d 1412 (7th Cir. 1993), the plaintiff successfully challenged the display of a crucifix in a public park. The crucifix was meant not just as a memorial to honor the servicemen who gave their lives in battle, but was intended “to remind motorists of the importance of religion in everyday life and to make Lake County Indiana the most God-fearing area in the mid-west.” *Id.* at 1414 (citation omitted). The express religious purpose—to make a county “God fearing”—is a stark contrast to the State’s secular purpose here, which is to permit private memorials to be erected so that the UHPA may:

- (a) [M]emorialize troopers who had died in the line of service;
- (b) Remind the traveling public of the service and sacrifice of troopers on the highways and elsewhere in Utah;
- (c) Remind the traveling public of the dangers of highway and automobile travel; and
- (d) Remind the traveling public to drive safely and vigilantly.

(Aplt. App. at 916, ¶ 4.) Because the message is conveyed to drivers passing the memorials “the symbol needed to prominently communicate all this instantaneously.” (Aplt. App. at 154, ¶ 6.) The UHPA chose the embellished cross-shape because it would “effectively convey the simultaneous messages of

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“Purely secular” markers or slabs would not adequately convey the twin purpose of honoring the trooper’s sacrifice and promoting safety on the highways because they are not as readily perceived as memorializing a death. (*See, e.g.*, Aplt. App. at 1719-20 (agreeing that passing motorists would “not necessarily” realize that a trooper had died by the roadside if an American flag was used as the memorial symbol instead of the cross).)

death, honor, remembrance, gratitude, sacrifice, and safety.” (Aplt. App. at 1866, ¶ 12.) The State allowed the memorials because they served these specific purposes. (Aplt. App. at 918, ¶ 15.) Consequently, the crosses at issue are twelve feet high; bear the name of the fallen trooper in large black lettering; and the logo of the Utah Highway Patrol. (Aplt. App. at 155, ¶¶ 14, 15, 16, 17.)

The use of the memorial cross in this context serves to “encourag[e] the recognition of what is worthy of appreciation in society.” *Lynch*, 465 U.S. at 693 (O’Connor, J., concurring). Placing the memorials in proximity to where the troopers were mortally injured ensures that these troopers do not become an abstract statistic. The memorials “send a *timeless* reminder . . . that these men were killed in the service of their state.” (Aplee. Supp. App. at 3117, ¶ 42 (emphasis added).)

Furthermore, the memorials serve the purposes of “foster[ing] patriotism, and express[ing] confidence in the future.” *See Gaylor*, 74 F.3d at 216 (citations omitted). The memorials use a symbol commonly associated with giving one’s life in the performance of public duties. (Aplt. App. at 1921, ¶¶ 8-10.) Viewing these memorials fosters patriotism by reminding the public that others are willing to pay the ultimate price in the pursuit of the public’s safety. (*See* Aplee. Supp. App. at 3168, ¶ 38.) The memorials provide confidence of continued protection by reminding the UHPA members of their solemn duty to protect and serve the people

of Utah. (*See id.* at ¶ 40.)

Because the objective observer is also presumed to be familiar with the history of the government's actions, *Weinbaum*, 541 F.3d at 1033 (citing *McCreary County*, 545 U.S. at 866), she knows that the Utah legislature passed a Resolution stating that “a white cross has become widely accepted as a symbol of a death, and not a religious symbol, when placed along a highway . . . [T]he primary feature of the [UHP] memorials is a white cross, which was never intended as a religious symbol, but as a symbol of the sacrifice made by these highway patrol officers . . . given the heartfelt yet nonsectarian intentions of the memorials . . . .” (Aplt. App. at 72; Aplt. App. at 1092-95.) Far from evincing an improper religious motive, the government has expressly disavowed such a purpose.

The Court must accept plausible secular purposes when reviewing government action. *Bauchman*, 132 F.3d at 553. “Unless the secular justification is a ‘sham’ or is ‘secondary’ to a religious purpose, we defer to the government's professed purpose for using the symbol.” *Weinbaum*, 541 F.3d at 1031. But no objective evidence exists to show that the State's purpose in allowing the memorials to be displayed is any different from that of the UHPA's secular purposes in erecting the memorials. Atheists could not identify any oral or written statement by a State of Utah employee, speaking on behalf of the state, that the memorials were erected to proselytize on behalf of a religion or for any religious

purpose whatsoever. (Aplt. App. at 1120; Aplt. App. at 1531; Aplt. App. at 1436; Aplt. App. at 1617; Aplt. App. at 1708-09, 1712, 1754; Aplt. App. at 1793, American Atheists Ans. First Set of Disc. Reqs., Ans. No. 1; Aplt. App. at 1806, Rivers Ans. First Set of Disc. Reqs., Ans. No. 1). Instead, Atheists acknowledge that the State’s allowance of the memorials serve the secular purpose of memorializing fallen state troopers. (Aplt. App. at 1520; Aplt. App. at 1123; Aplt. App. at 1730.)

**b. The memorials do not have the effect of endorsing religion.**

To establish a violation of the effect prong of the endorsement analysis, Atheists must show that allowing the UHPA to erect the memorials has the “*principle or primary effect of advancing or endorsing religion.*” *Bauchman*, 132 F.3d at 555. That does not mean “every governmental activity that confers a remote, incidental or indirect benefit upon religion is constitutionally invalid.” *Id.* (quoting *Lynch*, 465 U.S. at 683). When analyzing religious symbols and displays, factual specifics and “[c]ontext carries much weight in the Establishment Clause calculus.” *Weinbaum*, 541 F.3d at 1033. Context is so important that even if a particular display “appears similar in some respects to others that have been found unconstitutional in the past, other factors, unique to this case, may *require* [the court] to uphold” the challenged display. *Americans United for Sep. of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1544 (6th Cir. 1992) (emphasis

added). Given the origin and identifying features of the memorials, no objective, reasonable observer would view the UHPA's private memorials as an endorsement of religion.

This Court recently analyzed the nature of "endorsement" in relation to the display of crosses on a city-owned sports complex. In *Weinbaum*, this Court held that a sculpture bearing three steel crosses on the complex did not communicate endorsement of religion to the reasonable observer. 541 F.3d at 1037. Entitled, "*Unitas, Fortitudo, Excellentia*" ("Unity, Strength, Excellence") and containing a plaque explaining the artist's meaning of the various parts of the sculpture, *id.* at 1026, the Court held that, "the objective observer would recognize that the sculpture does not have the effect of endorsing Christianity," because he or she would be "[c]ognizant of the sculpture's purpose, context, and history." *Id.* at 1037. Rather the allusion to the Olympic spirit and the plaque encouraged the community to witness excellence at the Sports Complex. *Id.*

In passing on the reasonable observer of a Latin cross that was part of a veterans' memorial atop Mt. Soledad in San Diego, the Southern District of California found no establishment of religion. *Trunk v. San Diego*, 568 F. Supp. 2d 1199, 2008 WL 2917123 (S.D. Cal. 2008). The court held that "in the context of the larger memorial and especially numerous other secular elements, the primary effect [of the memorial] is patriotic and nationalistic, not religious," and

therefore, not an offense to the First Amendment. *Id.* at \*14. Unlike the reasonable observer in *Trunk*, Atheists ignore that “the cross has an established secondary meaning . . . particularly when it appears in military memorials, [and, therefore] the cross is likely to convey a non-religious meaning.” *Id.* at \*21. That is, Atheists here ignore the history and information displayed on the trooper memorials, which plain effect is to memorialize highway patrol officers. The identifying features on the memorials and the use of a cross as a memorial eclipses any religious symbolism. *Weinbaum*, 541 F.3d at 1035-36.

Atheists rely heavily on this Court’s ruling in *Friedman v. Board of County Commissioners of Bernalillo County*, 781 F.2d 777 (10th Cir. 1985) (en banc), but it, as well as other Tenth Circuit authority, is easily and conclusively distinguishable from the instant case. In *Friedman*, the dominant symbol in the Bernalillo County seal was a radiant cross set off by the statement, “With This We Overcome.” *Id.* at 779. The Court found that its only credible meaning was that the County will conquer with the power of the Christian cross. Contrast that to the memorials here which allude to no past or future conquest under the Christian cross. Rather the trooper memorials here identify their object as fallen troopers who died while serving their community.

Also distinguishable to the instant case is *Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1995), wherein the defendant city admitted that the unadorned

cross in its City seal reflected the Christian heritage of the area. This Court treated that as an admission that the seal was unambiguously religious. *Robinson* is easily distinguishable because the memorials here are not a salute to the Christian heritage of the area, but specifically honor highway patrol officers where they fell while trying to keep the highways safe.

Other cases cited by Atheists are also conclusively distinguishable. For example, in *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004), the court held that a Latin cross displayed in a national preserve by the National Park Service to memorialize World War I veterans violated the Establishment Clause. There, however, no plaque or sign indicated it was a war memorial. *Id.* at 549. The court held that a reasonable observer would think that the plain cross, without more, was endorsing religion. *Id.* at 550. *Accord Pinette*, 515 U.S. 753 (messages on displays mitigate endorsement).

Atheists also incorrectly point to *Gonzales*, 4 F.3d 1412, as supportive of its reasonable observer argument. There, the plaintiff challenged the display of a crucifix in a public park erected by the Knights of Columbus, a fraternal organization of the Roman Catholic Church. The cross featured a prominent figure of Jesus nailed on the cross entitled “God and Country” and containing the

inscription “INRI.”<sup>7</sup> *Id.* A plaque, once identifying the crucifix as a war memorial, had been missing for over ten years. *Id.* The court found an Establishment Clause violation because, unlike the UHPA memorials, “[t]he crucifix . . . does not bear secular trappings sufficient to neutralize its religious message.” *Id.* at 1423.

Significantly, Atheists’ cited authority supporting its “reasonable observer” arguments all pre-date *Van Orden*. (See Appellants’ Br. 30-35.) Atheists sidestep the substantive *Van Orden* passive display analysis, and nowhere explain why any of its cited authority would withstand similar review under *Van Orden*. Atheists simply assert that, although the Ten Commandments “convey an ‘undeniable historical meaning,’ a ‘secular moral message’ and a ‘historical message,’” a Roman cross, on the other hand, “has no secular meaning and no secular history.” (Appellants’ Br. 29.) As set out more fully above and below, Atheists are simply incorrect on the non-exclusive religious meaning of the cross and the current state of the law regarding passive displays.

Furthermore, this Court should reject the Atheists’ challenge given the unique aspects of the UHPA memorials. The UHPA crosses are clearly used as memorials to persons, not deities. Each prominently bears the name and badge number of a fallen officer, an explanatory plaque containing a photo and story of

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<sup>7</sup> INRI is an abbreviation for the Latin phrase *Iesus Nazarenius, Rex Iudaeorum*, meaning, “Jesus of Nazareth, King of the Jews.”

the officers' demise, and the UHP logo. Even Atheists recognize that these physical characteristics indicate that the crosses are intended as memorials to fallen state troopers. (Aplt. App. at 1520-21; Aplt. App. at 1126-27; Aplt. App. at 1603-04; Aplt. App. at 1708.)

Atheists also admit that a roadside cross generally signals that someone died near that spot. (Aplt. App. at 1447; Aplt. App. at 1125; Aplt. App. at 1543.) In this context, the reasonable observer would believe that (1) someone died near the location of the cross; and (2) the person who died was a state trooper. Atheists, including specific members, admit that the crosses convey as much (Aplt. App. at 1511; Aplt. App. at 1603), and serve the purpose of memorializing, honoring and commemorating the troopers' lives and service (Aplt. App. at 1520; Aplt. App. at 1123; Aplt. App. at 1730).

Because the objective observer is "competent to learn what history has to show," *McCreary County*, 545 U.S. at 866, he would know that white crosses bearing the deceased's name are symbols by which our country has historically memorialized those who sacrificed their lives for their fellow citizens, community, and country. (Aplt. App. at 1021-91; Aplt. App. at 1949-62; Aplt. App. at 2030-2170, 2362-67.) These crosses thus bear all the trappings of a memorial.

Atheists are very hard pressed to argue that the context and physical characteristics of the crosses are anything but what they appear to be: a memorial

to a fallen trooper. Indeed, Atheists and its testifying members have never seen a cross on or in religious property bearing the name, badge number, photograph, biography and logo of a Utah Highway Patrolman. (Aplt. App. at 1340-41; Aplt. App. at 1171; Aplt. App. at 1521; Aplt. App. at 1449-50; Aplt. App. at 1622; Aplt. App. at 1724.) Atheists' argument on appeal repeatedly ignores these factual dissimilarities between the trooper memorials and a plain Roman, Latin, or Christian cross exhibited in a setting that invites religious devotion.

In addition to the memorials' physical characteristics and setting, the reasonable observer knows of the UHPA's website, which contains the Roll Call of Honor for Fallen State Troopers, including the same photographs and biographical information affixed to the memorial crosses. *See* <http://www.utahtrooper.com/> (last visited October 10, 2008). A reasonable observer would know that the Utah legislature has passed a resolution which expressly disclaimed any endorsement of religion when using the cross as a memorial to the fallen troopers. (*See* Aplt. App. at 1092-95; Aplt. App. at 72.) Additionally, the media coverage of the UHPA memorial cross program made clear that the purpose in erecting the crosses was to honor the fallen state troopers. (Aplt. App. at 1174.)

While the above undisputed facts alone conclusively demonstrate that the trooper memorials do not communicate government favoritism of religion to an objective observer, the religious demographics of Utah further suggests that

religious devotion is unlikely to be the response of the reasonable observer. As Atheists point out, only about eighteen percent of Utahns belong to a religious group that might consider the cross religiously significant. (Appellants’ Br. 13-14.) Yet, Atheists nonetheless conclude that a “Roman cross erected on the right-of-way by the side of a highway conveys the message that a Christian died there.” (Appellants’ Br. 18.) Much more likely, in a state wherein so many do not attach personal religious significance to the cross, the reasonable observer would most likely *not* associate the memorial cross with Christianity at all. It strains credulity to think that LDS<sup>8</sup> members in the state legislature and in the UHPA, who most likely constitute at least a religious plurality there, would approve or erect memorial crosses by the state’s highways if they were not a commonly used symbol marking the location of a person’s death.

Atheists are obviously personally offended by the crosses, but no court has ever attributed “reasonable observer” status to such an eggshell Establishment Clause plaintiff with such an obvious agenda. In Plaintiff Rivers’ opinion, there is *never* a context in which it is acceptable for a cross to appear on public property. (Aplt. App. at 1177.) Atheists’ member Joel Layton objects to any display of a religious symbol on public grounds. (Aplt. App. at 1725-26.) But these views are completely out of line with Establishment Clause jurisprudence which holds that

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<sup>8</sup> Church of Jesus Christ of Latter Day Saints.

the display of religious symbols on public property is not an automatic violation of the Establishment Clause. *See Americans United for Separation of Church and State*, 980 F.2d at 1538-40 (upholding display of 20-foot high steel menorah in a public plaza); *Van Orden v. Perry*, 545 U.S. 677 (2005) (upholding display of Ten Commandments monument on grounds of state capitol); *Lynch*, 465 U.S. 668 (city’s inclusion of nativity scene in its holiday display did not violate Establishment Clause); *Pinette*, 515 U.S. 753 (city did not violate Establishment Clause by permitting private group to erect unattended cross on grounds of state capitol); *Weinbaum*, 541 F.3d at 1022 (“We did not, however, issue a *per se* rule” in previous cross cases. “These two Las Cruces cases illustrate the folly of doing so. On the whole, Establishment Clause cases are predominantly fact-driven . . . .”). And even *despite* its obvious subjective biases, Atheists *admit* that the effect of the memorial crosses on the reasonable observer is to convey the secular messages of honoring and commemorating the lives and service of the Utah Highway Patrolmen. (Aplt. App. at 1520, Clark Dep. at 20; Aplt. App. at 1123, Rivers Dep. at 27; Aplt. App. at 1730, Layton Dep. at 40.)

The Establishment Clause is not to be used to “sav[e] isolated non-adherents from the discomfort of viewing symbols of faith to which they do not subscribe.” *Gaylor*, 74 F.3d at 217 (citations omitted). To invalidate the memorial crosses because of their religious origin would be a “stilted over-

reaction” to our country’s history and not in-line with Supreme Court precedent. *See Lynch*, 465 U.S. at 685-86; *Marsh v. Chambers*, 463 U.S. 783 (1983). *Lynch*, *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916 (Utah 1993), and *Gaylor*, all acknowledge that the Country has a religious heritage. A reasonable, objective person would expect that some of the symbols of a nation’s religious heritage would influence broader cultural practice, without establishing a religion. To outlaw the traditional use of the memorial cross would promote disdain for, and ignorance of, history and culture; and worse, an open hostility towards religion.

**c. The memorials do not impermissibly entangle government and religion.**

Not every interaction between government and religion results in improper endorsement of religion. *Lemon*, 403 U.S. at 614. Only “*excessive* government entanglement with religion” violates the Establishment Clause. *Id.* at 613. To measure entanglement, the court “examine[s] the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.” *Citizens Concerned for Separation of Church and State v. City and County of Denver*, 481 F. Supp. 522, 530 (D. Colo. 1979) (citing *Lemon*, 403 U.S. at 615). Comprehensive, discriminating, and continuing state surveillance of a religious entity is the touchstone for finding excessive entanglement. *Lemon*, 403 U.S. at 619. Thus, in the Tenth Circuit, “[t]he entanglement analysis typically is applied

to circumstances in which the state is involving itself with a recognized religious activity or institution.” *Bauchman*, 132 F.3d at 556 (citation omitted). Here, no religious institution is benefited and no continuing state surveillance of a religious organization is occurring, as the state has had no relationship with a religious authority.

Atheists’ entanglement argument is appallingly weak. (Aplt. App. at 3016 (appellants admitting weakness of argument).) Atheists have no evidence that any clergy, church, religious group, or religious leader were involved in the selection of the memorials or that any religious entity requested that the State of Utah erect the memorial crosses. (Aplt. App. at 1342-43, 1356; Aplt. App. at 1118-19; Aplt. App. at 1530; Aplt. App. at 1439; Aplt. App. at 1616; Aplt. App. at 1720; Aplt. App. at 1793, American Atheists Ans. First Set of Disc. Reqs., Ans. No. 1; Aplt. App. at 1806, Rivers Ans. First Set of Disc. Reqs., Ans. No. 1.) Because this is not a “circumstance[] in which the state is involving itself with a recognized religious activity or institution,” the entanglement analysis is not even warranted here. *Bauchman*, 132 F.3d at 556 (citation omitted). And this issue is not in play on appeal because Atheists did not raise the issue in their briefing.

There is no Establishment Clause violation here because every prong of the *Lemon*-endorsement test is satisfied.

**B. The Memorials Do Not Violate the Establishment Clause Because They Are Passive Symbols That Historically Memorialize Public Servants.**

Assuming *arguendo* that the Fallen Trooper Memorials are “religious,” they remain entirely lawful under an exception to the *Lemon*-endorsement test, namely the test first articulated by the U.S. Supreme Court in *Marsh*, 463 U.S. 783. See *Newdow v. Bush*, 355 F. Supp. 2d 265, 283 (D.D.C. 2005) (“There are exceptions to the *Lemon* test . . . and one of those exceptions” is *Marsh*); *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1306 (M.D. Ala. 2002) (referring to *Marsh* as an “exception to the *Lemon* test”); *ACLU v. Capital Square Review & Advisory Bd.*, 20 F. Supp. 2d 1176, 1182 (S.D. Ohio 1998), *aff’d*, 243 F.3d 289 (6th Cir. 2001) (finding *Marsh* an exception to *Lemon*). Notably, the Supreme Court recently took a *Marsh*-type approach in *Van Orden*, 545 U.S. 677, to uphold a Ten Commandments monument on state property. Furthermore, such memorials are acceptable, even when using an inherently religious symbol, because such symbols are not necessarily exclusively religious.

**1. Religious symbols and practices are part of our national heritage.**

In *Marsh*, the Supreme Court upheld prayers offered by a publicly funded, Christian clergyman at the opening of the Nebraska legislature’s sessions. 463 U.S. at 786. The Court declared that the practice of prayer before legislative sessions “is deeply embedded in the history and tradition of this country,” and that

it had “become part of the fabric of our society.” *Id.* at 786, 792. The Court emphasized that long-standing traditions should be given great deference. *Id.* at 788. The *Marsh* test asks whether a long-standing practice, “based upon the historical acceptance[,] . . . [has] become ‘part of the fabric of our society.’” *Wallace v. Jaffree*, 472 U.S. 38, 63 n.4 (1995) (Powell, J., concurring) (citation omitted). The plurality in *Van Orden* specifically referred to *Marsh* as an example of how the recognition of the role of religion in our nation’s heritage is permissible under the Establishment Clause. *Van Orden*, 545 U.S. at 687-88.

Writing for the plurality in *Van Orden*, then Chief Justice Rehnquist noted that the constitutional analysis of the monument “is driven both by the nature of the monument and by our Nation’s history.” *Id.* at 686. Justice Rehnquist recognized that, “[t]here is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789.” *Lynch*, 465 U.S. at 674. He also cited the deeply embedded practice of recognizing the role religion has played in our Nation’s heritage. *Van Orden*, 545 U.S. at 687-88.

Rehnquist compared the monument outside the Texas State Capitol with other Ten Commandment displays on government property, describing them as “acknowledgements of the role played by the Ten Commandments in our Nation’s heritage,” *id.* at 688-89, and not as unconstitutional establishments of religion.

Thus, the *Van Orden* plurality applied a *Marsh* analysis to the Texas Decalogue and stated that *Lemon* is “not useful” in dealing with a “passive monument.” *Van Orden*, 545 U.S. at 686.<sup>9</sup>

Courts have used *Marsh* to uphold practices such as public proclamations with religious content, *Allen v. Consolidated City of Jacksonville*, 719 F. Supp. 1532, 1538 (M.D. Fla. 1989) (upholding a city resolution urging residents to participate in a day of prayer and commitment to fighting drugs); *Zwerling v. Reagan*, 576 F. Supp. 1373, 1378 (C.D. Cal. 1983) (upholding Presidential Year of the Bible proclamation); chaplaincy programs in the Army, *Katcoff v. Marsh*, 755 F.2d 223, 232 (2d Cir. 1985), and in a sheriff’s department, *Malyon v. Pierce County*, 935 P.2d 1272, 1285 (Wash. 1997); equal after-hours access to school facilities for religious purposes, *DeBoer v. Village of Oak Park*, 267 F.3d 558, 569 (7th Cir. 2001); the use of the phrase “in the year of our Lord” on law licenses and on notary public commissions, *Doe v. Louisiana Supreme Court*, No. CIV.A.91-6135, 1992 WL 373566, at \*6-7 (E.D. La. Dec. 8, 1992) (unpublished); state

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<sup>9</sup> Justice Breyer’s concurrence in *Van Orden* recognized the relevance of the *Marsh* analysis and found the *Lemon* test an unsatisfactory substitute for the exercise of legal judgment in these cases. *Van Orden*, 545 U.S. at 699-700. Breyer distinguished *Van Orden* from *McCreary County v. ACLU*, 545 U.S. 844 (2005)—the other Ten Commandments case decided the same day—by noting that the *Van Orden* display is “simply an effort primarily to reflect, historically, the secular impact of a religiously inspired document.” *Van Orden*, 545 U.S. at 703. This historical reflection is exactly what the *Marsh* court found constitutionally acceptable.

involvement in a Kosher food regulation, *Ran-Dav's County Kosher, Inc., v. State*, 608 A.2d 1353, 1375 (N.J. 1992) (relying on *Marsh's* "fabric of society" language); prayers at the presidential inaugural ceremonies, *Newdow v. Bush*, No. 01CV0218, 2001 U.S. Dist. LEXIS 25937 (E.D. Cal. July 17, 2001) (unpublished); *Newdow v. Bush*, No. 01CV0218, 2001 U.S. Dist. LEXIS 25936 (E.D. Cal. Dec. 28, 2001) (unpublished); *Newdow v. Bush*, No. 01CV0218, 2001 U.S. Dist. LEXIS 27758 (E.D. Cal. March 26, 2002) (unpublished); *Newdow v. Bush*, 355 F. Supp. 2d 265; and directly in religious display cases, *ACLU v. Wilkinson*, 701 F. Supp. 1296 (E.D. Ky. 1988), *State v. Freedom from Religion Foundation*, 898 P.2d 1013, 1029, 1043 (Colo. 1995), *Conrad v. City and County of Denver*, 724 P.2d 1309, 1314 (Colo. 1986), *ACLU v. Capital Square Review & Advisory Board*, 243 F.3d 289, 296, 300-01, 306 (6th Cir. 2001) (*en banc*), and *Murray v. Austin*, 947 F.2d 147, 170 (5th Cir. 1991) (cross on city insignia); and to help explain why displays should pass constitutional muster under the endorsement test. *See, e.g., Ams. United for Separation of Church & State v. Grand Rapids*, 980 F.2d 1538, 1544 (6th Cir. 1992); *Okrand v. City of Los Angeles*, 207 Cal. App. 3d 566, 576-77 (Ct. App. 1989); *Suhre v. Haywood County*, 55 F. Supp. 2d 384, 396 (W.D.N.C. 1999).

*Marsh* should control this case because using crosses to memorialize the dead acknowledges the role of religion in American life as well as the use of

religious symbols for secular purposes like honoring the nation's heroes, a practice our nation has heretofore not been shy to do.

**2. Use of the Cross to honor the dead is part of our national heritage.**

Indeed, this nation has enjoyed a long tradition of memorializing its heroes with monuments that contain religious references and symbols. Chief Justice Rehnquist himself pointed out several such examples in *Van Orden*:

The apex of the Washington Monument is inscribed "Laus Deo," which is translated to mean "Praise be to God," and multiple memorial stones in the monument contain Biblical citations. The Jefferson Memorial is engraved with three quotes from Jefferson that make God a central theme. Inscribed on the wall of the Lincoln Memorial are two . . . inscriptions [which] include . . . extensive acknowledgments of God. The first federal monument, which was accepted by the United States in honor of sailors who died in Tripoli, noted the dates of the fallen sailors as "the year of our Lord 1804. . . ."

*Van Orden*, 545 U.S. at 689 n.9.

Government use of religious symbols as memorials is perhaps most poignantly displayed in this country's national cemeteries. The United States currently maintains over one hundred and twenty-five domestic national cemeteries. Department of Veterans Affairs National Cemeteries, <http://www.cem.va.gov/cem/cems/listcem.asp> (last visited October 10, 2008). Since the end of World War I—almost ninety years—the government, upon request of the family, has engraved the Latin cross on headstones in its national cemeteries. History of Government Furnished Headstones and Markers,

<http://www.cem.va.gov/cem/hist/hmhist.asp> (last visited October 10, 2008). A visit to Arlington National Cemetery reveals that the Latin cross is pervasive in the sea of white headstones. Unidentified soldiers who fell in battle are honored by Arlington's Tomb of the Unknown Soldier, which reads, "Here Rests in Honored Glory an American Soldier Known but to God."<sup>10</sup> The United States also maintains twenty-four overseas military cemeteries. American Battle Monuments Commission, <http://www.abmc.gov/home.php> (last visited October 10, 2008). Virtually all of the overseas military cemeteries are overwhelmingly dominated by a single memorial symbol—rows upon rows of white, Latin crosses. *See id.* (ABMC Video, "Fields of Honor"). These examples demonstrate that this nation enjoys a long and unbroken tradition of using crosses and other religious symbols as memorials.

Arlington National Cemetery contains a number of memorial crosses erected there, *e.g.*, the Argonne Cross Memorial, which is a memorial to the soldiers of the World War I American Expeditionary forces in France,<sup>11</sup> and the Canadian Cross of Sacrifice, which honors U.S. citizens who served in the Canadian forces in the

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<sup>10</sup> *See* The Tomb of the Unknowns, Arlington National Cemetery, [http://www.arlingtoncemetery.org/descriptions/tous\\_back.html](http://www.arlingtoncemetery.org/descriptions/tous_back.html) (last visited October 10, 2008).

<sup>11</sup> *See* [http://www.arlingtoncemetery.org/visitor\\_information/Argonne\\_Cross.html](http://www.arlingtoncemetery.org/visitor_information/Argonne_Cross.html) (last visited October 10, 2008).

First and Second World Wars and Korean War.<sup>12</sup> There are countless crosses emblazoned on the tombstones of fallen servicemen and women. Other religious symbols adorn memorials as well. A ruling that the memorials in this case violate the Establishment Clause would indeed call into question the constitutionality of these communal memorials in our nation's cemeteries.<sup>13</sup>

Therefore, even if this Court attributed a strong religious nature to the crosses included in the memorials, then in light of these authorities the memorials would be valid under *Marsh*. As noted above, the historical acceptability and longevity of using religious symbols to memorialize fallen heroes means that the analysis here should begin with the presumption that the UHPA's use of the memorial cross is constitutional.

Appellants attempt to argue that the UHPA's memorial crosses "indicate[] that Christian troopers are revered as Christian heroes [sic] venerated by Christians" and that "[n]on-Christians are not part of the respect afforded these public servants." (Appellants' Br. 46.) Embedded in their conclusion, however, is Atheists' false and conclusory premise made explicit by one of its *amici*—namely

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<sup>12</sup> See [http://www.arlingtoncemetery.org/visitor\\_information/Canadian\\_Cross.html](http://www.arlingtoncemetery.org/visitor_information/Canadian_Cross.html) (last visited October 10, 2008).

<sup>13</sup> This Court may take judicial notice of the official websites and their recorded facts and photographs cited here in Section I.B., because they are issued by a public authority and as such are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

that the Latin cross’s “inherent” religiosity ineluctably renders the memorials unconstitutional. (*See* Am. Humanist Ass’n’s Br. 16-17.) AHA outlandishly points out that, because UHPA is represented by two organizations devoted to “defend religious liberty” UHPA cannot plausibly argue that “[t]he message UHPA intends to convey with the memorials is not a religious or sectarian message.” (Am. Humanist Ass’n’s Br. 13-14 (quoting Aplt. App. at 355).) AHA’s argument is lacking (if not flatly frivolous) in at least two ways.

First, it is highly improper to conflate *counsel’s* beliefs and mission with its client’s beliefs and legal positioning, as AHA has done. Even assuming, *arguendo*, that ADF and NLF do support a more tolerant and less “neutral” view of what is permissible government activity under the First Amendment than what is currently allowed under Supreme Court precedent, those views are not probative of the UHPA’s view or the facts as they apply to the law in this particular case. The court below was able to analyze the law in spite of what motives various counsel, including those of Atheists, may have had in taking the case.

More to the point, UHPA developed its memorial program, its motivation and means, long before the instant litigation and long before its retainer of the undersigned counsel. Both organizations representing UHPA have substantial experience in Establishment Clause litigation, were in a position to provide pro

bono counsel to a worthy private association, and UHPA freely accepted representation long after it had developed the program.

Furthermore, AHA has repeatedly asserted a false *per se* assumption (namely, if something is inherently religious, then it is impermissible under the First Amendment). Its position demonstrates ignorance of this Court's plain holding as to the various meanings of the Latin cross. *See Weinbaum*, 541 F.3d at 1022 (noting the "folly" of attempting to lay down *per se* rules for crosses cases, as they are especially fact-driven). In particular, this Court noted that, although the cross is "unequivocally a symbol of the Christian faith," *id.* at 1022, it is "not exclusively so," *id.* at 1023 n.2.

This Court's understanding that the Latin cross is not exclusively religious is well illustrated by the battlefield cemetery at Flanders Field near Waregem, Belgium, dedicated in 1937 to commemorate American soldiers who died fighting in World War I. *See* <http://www.abmc.gov/cemeteries/cemeteries/ff.php>, Flanders Field American Cemetery & Memorial Booklet at 5. In addition to placing a Latin cross at every non-Jewish soldier's grave (some of whom almost certainly were not Christian), it also placed one at the grave of every unidentified soldier, some of whom were likely Jewish. *See id.* at 12. Moreover, the cross marking the unidentified soldiers bear the engraving, "HERE RESTS IN HONORED GLORY AN AMERICAN SOLDIER KNOWN BUT TO GOD." *See id.* at 15.

The practice at Flanders Field is indicative of a longstanding and permissible tradition of honoring fallen heroes with Latin crosses, simultaneously evincing both a religious and non-religious meaning (*e.g.* their juxtaposition with Stars of David for Jewish graves (religious), as well as their use to mark graves of the unknown (non-religious)). This practice corresponds neatly with that of UHPA's in erecting its memorial crosses, and demonstrates the longstanding acceptability of using the Latin cross as a symbol of death, in addition to one of religious significance.<sup>14</sup>

A decision supporting the Atheists' view would be in direct conflict with the intentions of the Framers of the First Amendment and with deeply rooted practices and traditions of this nation. Throughout our nation's history our government has openly recognized religion on its property, especially that property used to commemorate those who have made the ultimate sacrifice. This Court should decide this case in the light of that history. The fallen trooper memorials will no

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<sup>14</sup> *Amicus* Americans United for Separation of Church and State (AUSCS) attempts to argue that the government should not by its actions "decree sacred symbols . . . sacred no more" and that to do so is offensive to religious people. (AUSCS Br. 21.) This misstates what various courts have said regarding religious symbolism in the public square. If a court were to declare a religious symbol no longer religious, that truly would be offensive. However, as has been argued more fully *passim*, courts have simply recognized when an item's use has extended *beyond* the sacred to include a secular use. It is undeniable the Latin cross has entered this territory. To accept AU's argument would be to say that the architects of the Supreme Court building desecrated the Ten Commandments by displaying them in bas relief engravings.

more endanger the Establishment Clause than does the Biblical inscription on the Liberty Bell,<sup>15</sup> or the national motto on our coins.

This Court should reject the notion that the First Amendment will not allow today what was permitted long ago by its very authors. Moreover, the burden of proving such a claim must be placed upon those who, by their “untutored devotion to the concept of neutrality,” *School District of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring), would deny the citizens of Utah this symbol of remembrance and acknowledgement of the sacrifice made by its fallen heroes.

**C. The Memorials Are Private Speech in a Limited, Non-Public Forum Created for the Secular Purpose of Honoring Fallen Troopers.**

The district court did not find it necessary to analyze this case under the First Amendment speech forum doctrines of the United States Supreme Court. (Aplt. App. at 3018 n. 10.) But if forum analysis is used, it is black letter law that the government can allow private speech on public property, as the State of Utah has done. *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 800 (1985). There are three main categories of forums: the traditional public forum, the designated public forum, and the non-public forum, which determine the

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<sup>15</sup> The Liberty Bell is inscribed with the following Bible verse, “Proclaim LIBERTY Throughout All the Land Unto All the Inhabitants Thereof (Leviticus, 25:10).” See Liberty Bell Center, <http://www.nps.gov/inde/liberty-bell-center.htm> (last visited October 8, 2008).

amount of protection given to speech. *Good News Club v. Milford*, 533 U.S. 98, 106 (2001). The Tenth Circuit recognizes a subset of the non-public forum, the limited public forum. *Sumnum v. Callaghan*, 130 F.3d 906, 914 (10th Cir. 1997).

A limited public forum arises where “the government allows selective access to some speakers or some types of speech in a nonpublic forum, but does not open the property sufficiently to become a designated public forum.” *Id.* at 916. A limited public forum does not become a designated forum open to the public “simply by allowing one private organization access to the forum.” *Id.* at 915. The selection of a speaker and topic is permissible so long as access to the forum is not denied based on the viewpoint of the speaker. *Id.* at 916.

The forum here is a limited, non-public forum because the State has allowed selective access to certain public property for the select purpose of memorializing fallen Utah highway patrolmen. The State may reasonably restrict the speakers to private, professional associations representing the interests of highway patrol officers and even to a single such speaker. The UHPA is clearly a qualified speaker within the selected forum: its stated purpose includes “supporting Utah State Highway Patrol Officers and acknowledging those troopers’ service to the people of the State of Utah.” (Aplt. App. at 38, ¶ 15.) The extensive efforts of the UHPA are to recognize “the loss of a trooper; their friend, father, husband, and hero.” (Aplee. Supp. App. at 3168, ¶¶ 36, 37.) Atheists’ claim on appeal that

UHPA has exclusive access to the forum is undeniably contradicted. Atheists admit that it is not a professional service association representing Utah highway patrol officers, and therefore not a similar speaker to UHPA. (Aplt. App. at 1433-34.) In fact, Atheists admit that it does not represent the interest of any single highway patrol officer and certainly not one that has fallen in the line of duty. (Aplt. App. at 1432-33.) Fatal to their totally unsupported assertion is their admission that they never asked for or were denied access to raise a memorial to a fallen highway patrol officer. (Aplt. App. at 1434-35.)<sup>16</sup> And the record is bare of any proof that any other person or group has sought access to raise a similar memorial, much less been denied because of their viewpoint.

Atheists' argument regarding, The Policy for Roadside Memorials, UDOT 06C-10 (Appellants' Br. 10), does not show that the State has allowed the UHPA exclusive access to public property to memorialize fallen troopers. On the contrary, that policy allows selective access to a non-public forum to permit the general public to memorialize a family member killed in a roadway fatality. The access allowed to honor fallen troopers is a different limited non-public forum altogether and is not controlled by UDOT 06-10. Access to memorialize fallen troopers is authorized under UT Code § 72-7-107 as part of a separate "highway safety program or highway safety practice." Access is predicated on being a

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<sup>16</sup> Plaintiffs did not even raise a First Amendment discrimination claim below.

service organization representing fallen troopers for the purpose of memorializing fallen troopers. Government control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. *Cornelius*, 473 U.S. at 806. Indeed, Atheists failed to cite a single authority that the State’s opening of a non-public forum for the limited purpose of memorializing fallen state troopers runs afoul of the Establishment Clause.

Finally, if, as Atheists request, the State were to exclude the memorials from the non-public forum on the ground that they are religious, the State would run afoul of the Free Speech and Free Exercise Clauses. As the Supreme Court has repeatedly explained, the exclusion of speech from a government forum “on the basis of its religious perspective” constitutes “unconstitutional viewpoint discrimination” in violation of the First Amendment. *Good News Club*, 533 U.S. at 107 n.2; *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993).

**D. The District Court Properly Struck the Declarations of O. Salah and Deen K. Chatterjee.**

A district court’s decision to exclude evidence at the summary judgment stage is reviewed for an abuse of discretion. *Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc.*, 131 F.3d 874, 894 (10th Cir. 1997). The third party

declarations of O. Salah and Deen K. Chatterjee do not claim to have observed the trooper memorials and neither even speaks about the memorials. (Aplt. App. at 712, 715.) Under Fed. R. Evid. 602 and 701, both lack personal knowledge of the trooper memorials and, therefore, are not helpful to determination of a fact in issue. Under Rule 401, their personal opinions about Latin crosses in the abstract do not address the existence of any fact of consequence to the action.

On appeal, Atheists argue contrary to the law that the district court erred in not considering its opinions as “part of the knowledge of the reasonable observer.” (Aplt. Br. 53.) Aside from the failure of the declarations to address the memorials at hand, the district court properly observed that “[a]ll parties agreed throughout the briefing that declarations are inadmissible to show the perceptions of a reasonable observer—that this issue is a question of law for the court to decide.” (Aplt. App. at 2905). The district court based its decision on *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996), where this Court stated, “[W]e do not ask whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the State] endorses religion . . . . It is instead an objective inquiry that this court is fully equipped to conduct with the facts at hand.” *Id.* (quotations omitted). The district court properly struck the declarations because

they are legal conclusions about what a reasonable observer would think when viewing a Latin cross.

Atheists assert that the UHPA and the State were allowed to file declarations about the effect of a Roman cross. (Aplt. Br. 54.) A challenge to a district court's impartiality is reviewed under an abuse of discretion standard. *Sac & Fox Nation v. Cuomo*, 193 F.3d 1162, 1168 (10th Cir. 1999). The UHPA and State declarations cited by Atheists actually refer to the trooper memorials with their specific features and context, not Latin or Roman crosses in the abstract. Also, those declarations relate specific personal knowledge as to the complete lack of religious purpose for using the cross as a component of the memorials. Those declarations specifically negate Atheists' claim that allowance of the memorials was motivated by a religious purpose. In contrast, the Salah and Chatterjee declarations present purely subjective perceptions of a Latin cross and then only in the abstract; not as a reasonable observer of the trooper memorials here. Moreover, the district court did not strike any of Atheists' declarations from witnesses whose testimony was based on personal knowledge of the trooper memorials. Thus, there is no evidence that the district court acted with partiality.

The district court also struck the Salah and Chatterjee declarations for violating the court's previous order requiring that all declarations must identify the affiant and the motion it supports. (Aplt. App. at 2904; Aplee. Supp. App. at

3195.) But those declarations did not identify a particular motion and were not filed with any particular motion as required by Fed. R. Civ. P. 56 (a) and correlative local rule DUCiv.R. 10-1(a) (2). Further, under 56(e), declarations not filed with or at least identified with a motion for summary judgment must be regarded as supplemental, and can only be filed with leave of court. Accordingly, the district court did not abuse its discretion when it struck both declarations because it was “inappropriate for plaintiffs [American Atheists] to have various affidavits parked in the docket for undetermined later uses as may suit them at any time during the litigation.” (Aplt. App. at 2904.)

Chatterjee’s declaration was also stricken because it was an untimely attempt to submit expert testimony about the effect the memorials would have on a reasonable observer. (Aplt. App. at 2904-05.) Chatterjee’s declaration includes his curriculum vitae as a philosophy professor and offers his expert opinion concerning religious symbolism. (Aplt. App. at 716-17.) Fed. R. Civ. P. 26(a)(2)(A) and (B) provide that a party must disclose expert evidence within the trial court’s timetable for disclosure. The district court had ordered that Atheists’ retained experts be disclosed on or before January 17, 2007. (Aplee. Supp. App. at 3189, 3191-92.) But Chatterjee’s declaration was not filed until June 29, 2007. Since no justification was given for the untimely disclosure, the district court was

certainly within its discretion to strike Chatterjee's expert opinion. *See* Fed. R. Civ. P. 37(c)(1).

## **II. ATHEISTS' CLAIM AGAINST THE STATE THAT ALLOWING THE DISPLAY OF THE UHPA MEMORIALS VIOLATES THE UTAH CONSTITUTION IS BARRED BY THE ELEVENTH AMENDMENT.**

In addition to the federal claim, Atheists' sought injunctive relief based on Utah Constitution, Art. 1 §4. But a state law claim against state officials brought into federal court under supplemental jurisdiction is barred by the Eleventh Amendment. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 103, 121 (1984). It does not matter what form of relief a citizen might request in a suit against a state; even a suit solely for prospective injunctive relief when it is brought against a state is barred by the amendment. *ANR Pipeline Co. v. LaFaver*, 150 F.3d 1178, 1187 (10th Cir. 1998). Therefore, Atheists state law claim that the memorials violate the Utah Constitution is barred for lack of subject matter jurisdiction.<sup>17</sup>

Even if the federal courts were not barred by the Eleventh Amendment from deciding the claim, the memorials do not violate Utah Constitution Art. 1 § 4's

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<sup>17</sup> While the district court did not rule on the Eleventh Amendment issue, UHPA raised it in its opposition to Atheists' motion for summary judgment below. (Aplee. Supp. App. at 2752.) But in any event, the defense of state sovereign immunity can be raised for the first time on appeal. *Cisneros v. Wilson*, 226 F.3d 1113, 1117 (10th Cir. 2000).

proscription against using public property to favor religious worship, exercise, or instruction. (Aplts. Br. 48.) Article 1 § 4 provides:

. . . No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment.

Utah Const. Art. 1, § 4.<sup>18</sup> First, the claim fails because the memorials unambiguously identify its object as a fallen trooper. Taking the plain meaning of Article 1 § 4, the display of the memorial here clearly identifying the memorialized as Utah highway patrol officers is hardly “religious worship,<sup>19</sup> exercise or instruction, or for support of any ecclesiastical establishment.”<sup>20</sup> Second, even if the displayed memorials were religious worship or exercise, Art. 1, § 4 is not

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<sup>18</sup> While it did not address the Atheists’ state constitutional claim directly, it apparently intended that its summary judgment decision also dispose of Atheists’ state constitutional claim on the merits. (Aplt. App. at 2997, n.1.)

<sup>19</sup> “Worship” has been generally defined by the various federal courts according to a common dictionary definition, rather than a legal one. *See e.g., Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 366 n.7 (2d Cir. 2003) (Miner, J. dissenting) (quoting the Oxford English Dictionary that worship is “[r]everence or veneration paid to a being or power regarded as supernatural or divine; the action or practice of displaying this by appropriate acts, rites, or ceremonies.”); *Hollywood Cmty. Synagogue v. City of Hollywood*, 436 F. Supp. 2d 1325, 1328 n.1 (S.D. Fla. 2006) (quoting Webster’s 3d New Int’l Unabridged Dictionary that worship is “the reverence or veneration tendered a divine being or supernatural power.”).

<sup>20</sup> Because the Utah Supreme Court has not fully defined “religious worship, exercise or instruction,” for purposes of Art. 1, § 4, and Atheists did not certify the question to the Utah Supreme Court, this Court could also decline jurisdiction to interpret an issue of unclear state law. *Railroad Comm. of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

violated as long as other qualified applicants are not denied the same use of government property because of their beliefs.

This second point is plainly illustrated by the Utah Supreme Court's decision in *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 938 (Utah 1993). While the court recognized that a city council's practice of permitting prayer during opening remarks at council meetings was a "religious exercise", it found the practice to be constitutional since no one was denied access to make opening prayers based on their belief system. *Id.* Use of public property that indirectly benefits religious worship, exercise, or instruction survives constitutional scrutiny under Art. 1 § 4 when the property is available on a nondiscriminatory basis and equally accessible. *Id.* Here, there is no evidence whatsoever that the State discriminated against any service organizations with an interest in honoring fallen troopers. No others have even asked to honor a fallen trooper, so it equally follows that no others have been denied access to State property to memorialize a fallen trooper because of their beliefs.

Atheists' citation to *Snyder v. Murray City Corp.*, 73 P.3d 325 (Utah 2003), does not help them. *Snyder* involved an applicant for opening prayer at a city council meeting who was discriminatorily denied access because of the prayer's content in violation of Art. 1 § 4. But there is no evidence of any discrimination here with respect to memorializing a fallen trooper. As such, Atheists' repeated

claim that the UHPA has been granted *exclusive* use of government property has no factual support whatsoever. (Appellants' Br. 48.)

Even if the Atheists claim under Utah Constitution Art. 1 § 4 was not barred by the Eleventh Amendment, the claim fails on the merits. Honoring fallen troopers with memorial crosses is not religious exercise, instruction or worship. But even if it were, nobody has been discriminated against because of their beliefs. Therefore, the district court properly dismissed this claim.

### CONCLUSION

This Court will affirm summary judgment in Establishment Clause claims when applying its *Lemon*/endorsement test precisely because it is an “objective inquiry.” *Weinbaum v. City of Las Cruces, N.M.*, 541 F.3d 1017, 1037 (10th Cir. 2008). The Court does not inquire “whether particular individuals might be offended” by the government's conduct. *Bauchman v. West High Sch.*, 132 F.3d 542, 555 (10th Cir. 1997). And it “need not sift through empirical evidence-polling data, statistics, or the like-because we need ‘not ask whether there is *any* person who could find an endorsement of religion . . . or whether *some* reasonable person *might* think [the State] endorses religion.’” *Weinbaum*, 541 F.3d at 1038 (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995)) (O'Connor, J., concurring). This Court “must simply view the symbol through an objective observer’s eyes. Accordingly, the question can be decided as

a matter of law, and is therefore appropriate for summary judgment on a sufficient record.” *Id.* at 1038; *see O’Connor v. Washburn Univ.*, 416 F.3d 1216, 1231 n.7 (10th Cir. 2005).

The record is sufficient here for this Court to affirm the district court’s summary judgment because the reasonable observer would not find that the State allowed the memorials for the primary purpose of endorsing religion or that the memorials have the primary effect of endorsing religion. The memorial crosses on the side of roadways unmistakably identify their primary object as highway patrol officers who gave their lives in the line of duty, not deities. The memorials represent a time honored method for memorializing fallen public servants and should pass Establishment Clause scrutiny even if display of a cross might endorse religion in a different context. And, the memorials are private speech in a nondiscriminatory forum for memorializing fallen troopers, and there is zero evidence that anyone has been denied access to the forum because of their viewpoint. Finally, Atheists’ state constitutional claim against Utah and its officials is barred by the Eleventh Amendment.

Respectfully submitted this the 15th day of October, 2008.

By: s/Byron J. Babione

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## **ORAL ARGUMENT STATEMENT**

Per 10th Cir. R. 28.2(C)(4), Intervener-Defendant-Appellee requests oral argument to address substantial constitutional questions involving freedom of speech and Establishment of Religion. Oral argument is necessary to permit the court to explore the important factual and legal issues in the case.

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE  
REQUIREMENTS**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(A)(7)(B) because this brief contains 13,442 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2007 Times New Roman 14 point font.

s/ Byron J. Babione

---

Byron J. Babione

Attorney for Intervenor-Defendant-Appellee

Dated: October 15, 2008

## CERTIFICATE OF SERVICE

I, Byron J. Babione, hereby certify that on October 15, 2008 I emailed a copy of the foregoing Brief of Utah Highway Patrol Association, Intervenor-Defendant Appellee to the following:

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and will mail, via U.S. Mail, one copy of the brief and supplemental appendix to the parties listed above.

Dated: October 15, 2008

s/ Byron J. Babione

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## **CERTIFICATION OF DIGITAL SUBMISSIONS**

I, Byron J. Babione, hereby certify that:

(1) 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;

(2) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program (McAfee, VirusScan Enterprise, Version 8.5i, updated on October 8, 2008) and, according to the program, are free of viruses.

Dated: October 15, 2008

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**ATTACHMENTS**

<u>Document:</u>	<u>Page from Appendix</u>
Exhibit A Report of Attorney Rule 26 Meeting (Doc. # 102) .....	3187
Exhibit B Supplemental Scheduling Order & Ordering Denying Motions to Strike (Doc. # 132) .....	3193
Exhibit C Order (Doc. # 150) .....	3196
Exhibit D Order Granting UHPA’s Motion to Strike Stipulated Facts (Doc. # 222) .....	2500

**ATTACHMENTS**

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Exhibit D Order Granting UHPA’s Motion to Strike Stipulated Facts (Doc. # 222) .....	2500

Exhibit A  
Report of Attorney Rule 26 Meeting  
(Doc. # 102)

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**ATTORNEY FOR PLAINTIFFS**

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

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

Case No. 02:05-CV-00994 DS

Plaintiffs,

**REPORT OF ATTORNEY  
RULE 26 MEETING**

vs.

**COLONEL SCOTT T. DUNCAN**,  
Superintendent, Utah Highway Patrol;  
**JOHN NJORD**, Executive Director,  
Utah Department of Transportation;  
**D'ARCY PIGNANELLI**, Executive Director,  
Department of Administrative Services; and,  
**F. KEITH STEPAN**, Director  
Division of Facilities Construction and Management  
Department of Administrative Services,

(Judge David Sam)

Defendants.

**UTAH HIGHWAY PATROL ASSOCIATION**,

Defendant/Intervener

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1. **ATTORNEYS' MEETING:** Pursuant to Fed.R.Civ.P. 26(f), a meeting was held on Friday, August 25, 2006 at 11:00 o'clock a.m. by phone.

a. The following counsel participated:

*For Plaintiff: Brian M. Barnard*

*For Defendant: Thomas Roberts*

*For Defendant/Intervener: Frank Mylar and Byron Babione*

b. The parties discussed the nature and basis of their claims and defenses.

2. **INITIAL DISCLOSURE:** The parties will exchange by September 17, 2006 the information required by Rule 26(a)(1).

3. **DISCOVERY PLAN:** The parties jointly propose to the court the following discovery plan:

a. As per Rule 26(b)(1), discovery shall be conducted as to all issues and defenses raised in the Complaint and Answers.

b. All discovery will be completed no later than April 17, 2007.

c. The following discovery methods will be used:

Interrogatories  Requests for Admission

*The maximum number of interrogatories that will be served on any party by any other party is twenty-five (25); responses are due as per the Federal Rules of Civil Procedure. The maximum number of requests for admission that will be served on any party is seventy-five (75); responses are due as per the Federal Rules of Civil Procedure.*

Oral Exam Depositions  Written Questions Depositions

*The maximum number shall be ten (10) for plaintiffs, five(5) for defendants and five (5) for intervener/defendant.*

*The parties may move the court for additional depositions.*

*The maximum number of hours for each deposition shall be seven (7) in one (1)*

*day unless extended by agreement of the parties.*

- d. All methods of discovery provided by the Federal Rules of Civil Procedure may be used by the parties.
- e. Reports from plaintiffs' retained experts under Rule 26(a)(2) will be served upon designation which shall be on or before: January 17, 2007 by plaintiffs. Reports from defendants' retained experts under Rule 26(a)(2) will be served upon designation which shall be on or before: February 17, 2007.
- f. As soon as an expert is retained, his/her identity and qualifications shall be provided to all parties.
- g. Counter experts, if any, shall be designated within forty-five (45) days of initial designation of experts as per (e) above.
- h. Supplementations under Fed.R.Civ.Pro. 26(e) are due as per the rules and sixty (60) days before close of discovery.

**4. OTHER ITEMS:**

- a. The parties do not request a conference with the court prior to entry of the scheduling order based upon this report.
- b. The parties request a final pretrial conference after September 17, 2007.
- c. The cutoff date for joining additional parties is:  
October 15, 2006.
- d. The cutoff date for amending pleadings is:  
October 15, 2006.
- e. The cutoff date for filing dispositive or potentially dispositive motions is  
June 30, 2007.
- f. The potential for settlement is:        \_\_\_\_\_ likely      X   unlikely
- g. The potential for resolution of this matter through the court's alternative dispute resolution program is  
*Via arbitration:*            Nil  
*Via mediation:*            \_\_\_\_\_ likely      X   unlikely

- h. Final lists of witnesses and exhibits pursuant to Fed.R.Civ.Pro 26(a)(3) are due from both parties thirty (30) days before trial.
- i. The parties shall have fourteen (14) days after service of final lists of witnesses and exhibits to make written objections under Rule 26(a)(3).
- j. This case should be ready for trial after September 17, 2007.
- k. The estimated length of the bench trial is: three (3) - five (5) days.
- l. A jury has not been demanded.
- m. All deadlines are mid-night on the date designated.
- n. As to trial preparation, the parties shall comply with the deadlines, requirements, etc. of the Federal Rules of Civil Procedure and the local rules of this Court.
- o. Without waiving relief sought in the Rule 56(f) affidavit (Doc. # 91) or in the opposition thereto (Doc. # 95), the parties jointly move the Court to lift the order staying discovery. Doc. # 64.

Dated this 31<sup>st</sup> day of AUGUST 2006.

*/s/ Brian M. Barnard*

*/s/ Frank Mylar<sup>1</sup>*

---

BRIAN M. BARNARD  
Attorney for Plaintiffs

---

FRANK MYLAR  
Attorney for Intervener/Defendants

*/s/ Thom Roberts<sup>1</sup>*

*/s/ Byron Babione<sup>1</sup>*

---

THOM ROBERTS  
Attorney for Defendants

---

BYRON BABIONE  
Attorney for Intervener/Defendants

•

---

<sup>1</sup> I certify that I have the signed facsimile of this document which is available for inspection during normal business hours by the Court of a party to this action.

*/s/ BRIAN M. BARNARD*

Exhibit B  
Supplemental Scheduling Order & Ordering Denying Motions to Strike  
(Doc. # 132)

FILED  
CLERK OF COURT  
2006 OCT 27 10 2 12  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH CENTRAL DIVISION

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

Case No. 02:05-CV-00994 DS

Plaintiffs, :

**SUPPLEMENTAL**  
**SCHEDULING ORDER**  
**& ORDERING DENYING**  
**MOTIONS TO STRIKE**

vs. :

**COLONEL SCOTT T. DUNCAN,** :  
Superintendent, Utah Highway Patrol; :  
**JOHN NJORD,** Executive Director, :  
Utah Department of Transportation; :  
**D'ARCY PIGNANELLI,** Executive Director, :  
Department of Administrative Services; and, :  
**F. KEITH STEPAN,** Director :  
Division of Facilities Construction and Management :  
Department of Administrative Services, :

(Judge David Sam)

Defendants. :

**UTAH HIGHWAY PATROL ASSOCIATION,** :  
a Utah non-profit corporation, :

Defendant / Intervener. :

---

THE ABOVE CAPTIONED MATTER having come before the Court on Tuesday,  
October 24, 2006 at 1:30 p.m., for a telephonic scheduling and status conference, the Hon. David  
Sam presiding, the plaintiffs appearing by and through counsel, Brian M. Barnard, the state  
defendants appearing by and through counsel, Thom Roberts, Assistant Attorney General and the

defendant intervener UHPA appearing by and through counsel, Frank Mylar and Byron Babione, the Court having discussed several pending matters with counsel and having reached a decision, based thereon and for good cause appearing,

IT IS HEREBY ORDERED that the hearing on various matters in this action now set for November 7, 2006 is vacated;

IT IS HEREBY ORDERED that responses to the two (2) pending motions for summary judgment (Doc. # 85; Doc. # 110) shall be due on June 30, 2007 the deadline for filing dispositive motions;

IT IS HEREBY ORDERED that no further dispositive motions and/or supporting papers, including affidavits or declarations, shall be filed until June 30, 2007;

IT IS HEREBY ORDERED that no further documents, including affidavits or declarations, will be filed in support of any pending motions until June 30, 2007;

IT IS HEREBY ORDERED that plaintiffs' motion to strike various declarations (Doc. # 58; # 62; # 65; # 67; # 69; # 80) should be and hereby are denied; the court having considered and noted plaintiffs' concerns with regard to the contents of those declarations. The court's position is that it will give appropriate weight to the admissible portions of the declarations.

IT IS HEREBY ORDERED that all affidavits or declarations shall be titled with the name of the affiant as well as the name of the motion they are filed in support of. Failure to identify the declarations in this manner will result in their being stricken and not considered by the court.

DATED this 7<sup>E</sup> day of NOVEMBER 2006.

BY THE COURT:

  
\_\_\_\_\_  
DAVID SAM  
SENIOR JUDGE  
UNITED STATES DISTRICT COURT

Exhibit C  
Order  
(Doc. # 150)

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

\* \* \* \* \*

AMERICAN ATHEISTS, INC., a ) Case No. 2:05CV00994 DS
Texas non-profit corporation;
R. ANDREWS, S. CLARK and )
M. RIVERS, )

Plaintiffs, )

vs. ) O R D E R

COLONEL SCOTT T. DUNCAN, )
Superintendent, Utah Highway
Patrol; JOHN NJORD, Executive )
Director, Utah Department of
Transportation; D'ARCY )
PIGNANELLI, Executive Director,
Department of Administrative )
Services; and F. KEITH STEPAN,
Director Division of Facilities )
Construction and Management
Department of Administrative )
Services, )

Defendants )

UTAH HIGHWAY PATROL )
ASSOCIATION, Intervenor-
Defendant. )

\* \* \* \* \*

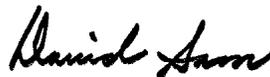
This matter is before the court on plaintiffs' motion to
extend time to name expert witnesses. While the scheduling order
indicates a deadline of January 17, 2007, the court is not
convinced of any prejudice to defendants that will result if the
deadline is extended. Furthermore, the State Defendants did not

oppose the motion. In extending the deadline, the court is not making any determination on the usefulness or admissibility of any potential expert testimony. Rather, in light of the state defendants' delay in producing documents and making initial disclosures, the court is simply extending the deadline. Plaintiffs originally asked for an extension through February 19, 2007. The court did not receive the reply brief in this matter until after that deadline. Accordingly, the court grants the motion and plaintiffs are hereby given twenty (20) days from the date of this order to name expert(s) and submit expert report(s).

SO ORDERED.

DATED this 29th day of March, 2007.

BY THE COURT:



---

DAVID SAM  
SENIOR JUDGE  
U.S. DISTRICT COURT

Exhibit D  
Order Granting UHPA's Motion to Strike Stipulated Facts  
(Doc. # 222)

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

\*\*\*\*\*

AMERICAN ATHEISTS, INC., et al., )

Case No. 2:05CV994 DS

Plaintiffs,

vs. )

ORDER GRANTING UHPA'S  
MOTION TO STRIKE  
STIPULATED FACTS  
(Doc. #84)

COLONEL SCOTT T. DUNCAN, et al., )

Defendants. )

UTAH HIGHWAY PATROL )  
ASSOCIATION, )

Intervenor-Defendant.

\*\*\*\*\*

This matter came before the court on motion of UHPA to strike stipulated facts (Doc. # 84). The court has reviewed the parties' briefs and finds the motion has merit. The court finds the "Stipulated Facts" were submitted to the court without any notice to, or participation by, the UHPA which is a full participant in the litigation before the court. Furthermore, the court finds UHPA's interests are directly affected by the "Stipulated Facts" as indicated by plaintiffs' reliance on reference to those facts in their dispositive motions. See Response in Opposition to Defendant-Intervener UHPA's Motion to Strike Stipulated Facts (Doc. 174) at 3.

The court is not persuaded that UHPA's motion is untimely. The court agrees with UHPA that when the Stipulated Facts were originally filed they appeared in the docketed without reference

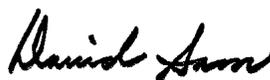
or relation to any pending motion. Such was a typical practice of plaintiffs during the early briefing in this case (a practice the court has since restrained). Furthermore, the court's order which imposed the ban on filing new motions while discovery was being conducted had an unusual effect on several motions and briefs filed to date. When new motions were allowed to be filed (June 30, 2007 according to the court's order) UHPA filed the motion to strike.

Accordingly, with good cause, the court finds that both judicial economy and the convenience of *all* parties will be best served by striking the Stipulated Facts to which UHPA was not a party. If a telephone conference is required to address the impact of this order on pending motions for summary judgment, counsel are instructed to contact the court and make appropriate arrangements.

SO ORDERED.

DATED this 16th day of August, 2007.

BY THE COURT:



---

DAVID SAM  
SENIOR JUDGE  
U.S. DISTRICT COURT