

No. 08-4061

IN THE
United States Court of Appeals
FOR THE TENTH CIRCUIT

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

Plaintiffs-Appellants,

—v.—

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

Defendants-Appellees,

—and—

UTAH HIGHWAY PATROL ASSOCIATION,

Intervener-Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

**BRIEF OF *AMICUS CURIAE* THE AMERICAN LEGION
IN SUPPORT OF APPELLEES, SEEKING AFFIRMANCE**

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ORAL ARGUMENT NOT REQUESTED

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus The American Legion is a 501(c)(19) nonprofit corporation. *Amicus* has no corporate parent, and no publicly held corporations own any part of *amicus*.

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INTEREST OF THE *AMICUS CURIAE*¹

Amicus Curiae, The American Legion (“The Legion”), is interested in this appeal because the district court, having correctly concluded under controlling authority and the “reasonable observer” test that the memorial crosses erected by Intervenor-Defendant Appellee Utah Highway Patrol Association (“UHPA”) do not violate the Establishment Clause, went on to bolster its analysis by reference to the religious demographics of the Utah residents most likely to view the UHPA’s memorials. The Legion respectfully submits that this analysis was unnecessary to the district court’s decision, not called for under the precedent, and states an erroneous framework for analysis of similar, previously unchallenged memorials, located across the United States. Many such memorials are maintained by the Legion on patriotic holidays, including Veterans Day, July Fourth and Memorial Day, among other special occasions.

The Legion was chartered by Congress in 1919 as a patriotic, mutual-help, war-time veterans organization. Among numerous other of its veteran support activities, The Legion honors service men and women who have sacrificed their lives in defense of our nation’s freedom by striving to ensure

¹ Concurrently with the filing of this Brief, The Legion has moved this Court for leave to file this Brief, pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure.

that they are properly remembered in local, state and national war memorials. For almost 90 years, The Legion has adorned thousands of such memorials with flags and other patriotic memorabilia, at locations spread across all fifty states. Some of the memorials are in the shape of a cross, and they are situated both on property owned by state or local governments across the country, and on private property.

Like the UHPA, The Legion's purpose in honoring these memorials is to pay tribute to the memory and honor of the men and women killed in the line of duty. The Legion's purpose is not intended to, and does not, espouse or endorse religion, much less any particular religion. Rather, The Legion recognizes that the cross is used because it is a symbol used for centuries to signify the life, sacrifices, and ultimate price paid by those who have died in service to America.

Undoubtedly, a number of the cross memorials are located in communities where a majority of the population are members of Christian churches, for whom the cross stands as a revered symbol of their Christian faith. Yet the constitutionality of these long-standing veterans' cross memorials is potentially cast into doubt by the district court's reasoning that, because the majority of Utah residents do not use the cross for religious purposes, they are unlikely to view the UHPA's cross memorials as intended

to promote religion in general or any specific religion. By this reasoning, if the same cross memorials were located in a Christian majority community, it might weigh in favor of finding an Establishment Clause violation. This is an erroneous analysis that can not be applied uniformly nationwide and which, if accepted as a new standard, could lead to myriad lawsuits across the country resulting in a patchwork of inconsistent decisions based on the prevailing religious affiliations in local communities.

For the reasons set forth below, this Court should ignore the district court's reference to Utah's religious demographics as unnecessary, and, in any event, contrary to applicable law. There is ample basis and sound reason for this Court to affirm the district court's decision, without reference to its discussion of the majority religion in Utah.

ARGUMENT

HAVING CORRECTLY FOUND THAT THE UHPA'S CROSS MEMORIALS MEET THE "REASONABLE OBSERVER" STANDARD, THE DISTRICT COURT'S FURTHER ANALYSIS OF UTAH'S MAJORITY RELIGIOUS DEMOGRAPHIC WAS UNNECESSARY TO ITS CORE DECISION, AND ERRONEOUS

A. The Decision Below Should Be Affirmed Because, Without Reference To Utah's Religious Demographics, It Correctly Applies The Controlling Authorities To The Undisputed Facts

If the district court's references to Utah's majority religion were removed completely from its decision, the opinion nevertheless withstands scrutiny because it rests on sound legal analysis applied to the facts.

The court below correctly began its analysis with by turning to the Supreme Court's decision in Lemon v. Kurtzman, where the Court found that in order to comply with the Establishment Clause, when the government permits private speech on government property, that private speech it must: (i) have a secular purpose in allowing the speech, (ii) the principal effect of allowing the speech neither advances nor inhibits religion, and (iii) allowing the speech does not foster excessive government entanglement with religion.² 403 U.S. 602, 612-13 (1971). The purpose and effect prongs of

² Although the Lemon test has been repeatedly criticized and reframed by the Supreme Court, it has not been overruled and therefore is the test applied in this Circuit. See O'Connor v. Washburn Univ., 416 F.3d 1216, 1224 (10th Cir. 2005). Indeed, the District Court applied the following permutation of the Lemon test, which it applied with guidance from this Court's decision in Bauchman v. W. High Sch., 132 F.3d 542, 552

the Lemon test were later revised by the “reasonable observer” test, first articulated in Justice O'Connor's concurrence in Lynch v. Donnelly, 465 U.S. 668 (1984). In Lynch, Justice O'Connor proposed that Establishment Clauses analysis should consider "the intention of the speaker," (i.e. the subjective government purpose) and "the objective meaning of the statement in the community" (i.e. the statement's objective effect). Id. at 690 (1984) (O'Connor, J., concurring).

As a result, the effect prong of the Lemon test does not “focus on the actual perception of individual observers, who naturally have differing degrees of knowledge.” Capitol Square Review & Advisory Bd., 515 U.S. 753, 780 (1995) (O'Connor, J., concurring). Instead, the test contemplates “a personification of a community ideal of reasonable behavior.” Id. at 780. The knowledge ascribed to the reasonable observer includes information gleaned from viewing the challenged display, within the viewer's larger awareness of the history and context surrounding the display. Id. at 780-81; see also O'Connor v. Washburn Univ., 416 F.3d 1216 (10th Cir. 2005); Bauchman v. W. High Sch., 132 F.3d 542, 551-52 (10th Cir. 1997).

(10th Cir. 1997): “Has either (1) the purpose or (2) the effect of the State Defendants' conduct conveyed a message that religion or a particular religious belief is favored or preferred, or (3) does the State Defendants' conduct qualify as excessive entanglement?” Am. Atheists, Inc. v. Duncan, 528 F. Supp. 2d 1245, 1252-53 (D. Utah 2007).

Against the backdrop of the above controlling authorities, the district court appropriately recognized America's "long tradition of displaying the cross as a symbol of death and burial. For example, American military cemeteries display crosses to represent the death of public servants." Am. Atheists, Inc. v. Duncan, 528 F. Supp. 2d 1245, 1257 (D. Utah 2007).

The court recognized that "[w]hen symbols, such as crosses, take on secular as well as religious connotations in a particular setting, they do not automatically constitute an endorsement of religion." Id. at 1257.

The court therefore concluded correctly that a reasonable observer of the UHPA memorials would not understand the government to be endorsing a particular religion, because "the memorial crosses at issue communicate a secular message, a message that a patrolman died or was mortally wounded at a particular location." Id. at 1253. In making that finding, the court took into account the setting and context surrounding the memorials and the history and purpose underlying their establishment as required by both the Supreme Court's and this Circuit's jurisprudence. This required the finding that the purpose of the memorials was to honor "UHP troopers who died during their term of service," that the cross serves as a secular symbol of death and burial in addition to a Christian religious symbol, and that "the position [of the cross] at the side of the road is devoid of context suggestive

of, or conducive to, worship.” Id. at 1254, 1257, 1259. These conclusions provide ample basis for the court’s ruling as follows,

The court finds that defendants’ conduct does not have the effect of conveying the message that religion in general or any particular religion is favored because the cross here serves as a secular symbol of death or burial, not as a religious symbol. (Id. at 1257)

* * * *

Consequently, the court finds that a reasonable observer, aware of history and context of the community would not view the memorial crosses as a government endorsement of religion.

Id. at 1258.

These conclusions stand on their own and need no support from court’s subsequent discussion of Utah’s prevailing religious demographics.

B. The District Court’s Reference To Utah’s Majority Religion Demographic Was Unnecessary And Erroneous

Having already reached the correct conclusion, the court below then went on to discuss, purportedly as further support for its decision, the fact that a majority of Utahns are members of the Latter Day Saints, a religious group that does not view the cross as a religious symbol. This analysis was unnecessary and erroneous. It was unnecessary because, as shown above, the court had already reached its decision on the basis of controlling law and undisputed facts.

It was erroneous because the reasonable observer test should not include or require an analysis of specific demographical information or religious affiliation. As the Supreme Court recognized in Van Orden v. Perry, the “Court looks for the meaning to an observer of indeterminate religious affiliation who knows all the facts and circumstances surrounding a challenged display.”³ 545 U.S. 677, 696 (2005) (Thomas, J., concurring) (emphasis added); see also Weinbaum v. City of Las Cruces, --- F.3d ----, 2008 WL 4182390, at *15 (10th Cir. Sept. 12, 2008) (“We 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.’”) (citing Capitol Square, 515 U.S. at 780 (1995) (O'Connor, J., concurring); Trunk v. City of San Diego, --- F. Supp. 2d ----, 2008 WL 2917123, at *9 (S.D. Cal. July 29, 2008) (whether viewers of a 29-foot cross veteran’s memorial would believe it endorsed a particular religion is “to be analyzed from the point of view of an intelligent, well-informed ‘reasonable observer,’ who represents both Christians and non-Christians...”) (emphasis added).

³ In his concurrence Justice Thomas criticized the development of the reasonable observer test as developed by the Court, but recognized the test requires the consideration of a hypothetical person without regard to religious affiliation. See Van Orden, 545 U.S.

In addition to being irrelevant, the court's consideration of Utah's religious composition sets an erroneous precedent. Requiring courts to use religious demographic data as part of the reasonable observer analyses would make the outcomes dependent upon a particular community's prevailing religion. A memorial cross would be more likely to satisfy the reasonable observer test in predominately non-Christian areas than in areas that have majority Christian populations. This framework would lead to inconsistent methods of honoring public servants and veterans, even though memorials such as the UHPA's are widely recognized as remembrance memorials.

As established above, settled case law assumes that the reasonable observer has knowledge of the history and context of a symbol within a community, regardless of his/her religious affiliation. Therefore, the district court's use of demographics was unnecessary, and should not be considered by this Court in its application of the reasonable observer test.

at 696 (Thomas, J., concurring).

CONCLUSION

Based upon the foregoing reasons, the American Legion respectfully requests that this Court affirm the district court's ruling.

Respectfully submitted,

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⁴ Application for admission to the Tenth Circuit pending.

CERTIFICATE OF SERVICE

08-4061

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