

08-4061

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

American Atheists, Inc., et al.,

Plaintiffs-Appellants,

v.

Scott T. Duncan, Colonel, Superintendent of Utah Highway Patrol, et al.,

Defendants-Appellees,

and

Utah Highway Patrol Association,

Intervenor-Defendant-Appellee.

On Appeal from the United States District Court for the District of Utah
The Honorable Judge David Sam
District Court Case No. 02:05-CV-0094-DS

**BRIEF OF AMICUS CURIAE ROBERT E. MACKEY IN SUPPORT OF
APPELLEES, SEEKING AFFIRMANCE**

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PRIOR OR RELATED APPEALS

None.

STATEMENT OF IDENTITY AND INTEREST

This amicus curiae brief is filed on behalf of Robert E. Mackey.

Robert Mackey organized the 1995 initiative to place fourteen granite crosses on Storm King Mountain, located in the White River National Forest. The crosses memorialize the death and sacrifice of Mr.

Mackey's son, Donald Mackey, and thirteen other firefighters who lost their lives while fighting the South Canyon Fire near Glenwood Springs, Colorado on July 5, 1994.¹

After visiting Storm King Mountain two weeks after the fire and viewing the simple wood crosses that had been placed to mark the location where each firefighter's body was found, Robert Mackey decided to organize an effort to install permanent crosses to mark the location where each firefighter had died. Mr. Mackey chose a Latin cross as a marker because it is an instantly recognizable symbol of a memorial to the dead. In April 1995, Mr. Mackey organized the effort to

¹ The events on Storm King Mountain and the tragic deaths of the fourteen firefighters are detailed in Butler, Bret W. et al., "Fire Behavior Associated with the 1994 South Canyon Fire on Storm King Mountain, Colorado," *Forest Service, Rocky Mountain Research Station*, United States Dep't of Agriculture, RMRS-RP-9 (September 1998), available at http://www.fs.fed.us/rm/pubs/rmrs_rp009.pdf, and served as the basis for John N. Maclean's *Fire on the Mountain: The True Story of the South Canyon Fire* (Wash. Sq. Press 1999).

raise private donations and volunteer labor to install fourteen granite crosses, approximately 18 inches tall, on Storm King Mountain, bearing the name of each firefighter.² The crosses were erected with the permission of each firefighter's family and the Bureau of Land Management. At the request of the family of Terri Hagen, a Native American firefighter, her cross was modified to include a circle of black steel symbolizing the circle of life.

In the more than thirteen years since the granite memorial crosses were installed, Mr. Mackey and many others have visited the crosses to pay respect to the firefighters who gave their life fighting the South Canyon fire. As Mr. Mackey stated in his declaration filed with the District Court, the crosses were erected "to memorialize the deaths of the firefighters" and "have nothing to do with churches, religious denominations or any effort to impose anyone's faith on anyone else." (Aplt. App. at 1919-26.)

If successful, Appellants' efforts would force the removal of the Utah Trooper memorial crosses from state-owned land and may call

² A photograph of Donald Mackey's memorial cross was filed with the District Court (Appellant's App. at Vol. II, 482), and is attached hereto as Exhibit A.

into question the existence of the firefighter memorial crosses on Storm King Mountain and other similar memorials around the country located on state and federal land.

Pursuant to Fed. R. App. P. 29(a), counsel for Mr. Mackey conferred with counsel for all parties. Counsel for Appellants and UHPA consented to the filing of this brief, and counsel for the State of Utah indicated that they did not oppose the filing of this brief.

I. INTRODUCTION

This case involves the State of Utah's non-exclusive grant of permission to a private association, the Utah Highway Patrol Association ("UHPA"), to display memorial crosses on State-owned roadside easements bearing the Utah Highway Patrol logo in order to commemorate the deaths of state troopers who were killed or mortally wounded in the line of duty. As recounted by the District Court, it is undisputed that: 1) UHPA is not a religious organization; 2) UHPA erects twelve-foot memorial Latin crosses to honor fallen state troopers with the consent of their families; 3) UHPA would place a memorial marker in a symbol other than a cross if requested to by the family; 4) UHPA selected a Latin cross because it is a commonly used memorial symbol in cemeteries, including government owned military cemeteries; 5) the trooper cross memorials are not funded by Utah and are created, designed, funded, erected and maintained by UHPA; and 6) UHPA did not intend to convey a religious message when it selected the Latin cross as a memorial symbol. *American Atheists v. Duncan*, 528 F. Supp. 2d 1245, 1247-50 (D. Utah 2007) (recounting undisputed facts).

Nevertheless, Appellant American Atheists, Inc., and three members of American Atheists, Inc., R. Andrews, S. Clark and M. Rivers (collectively “American Atheists”), challenge the state of Utah’s decision to allow UHPA to erect the privately funded memorial crosses on state-owned land to honor fallen state troopers.

As part of their efforts, American Atheists and Amici in Support of Appellant American Humanist Association (“AHA”) and Americans United For Separation of Church and State, et al (collectively “AUSCS”) attempt to cast Utah’s grant of permission to a private organization to voluntarily express its members’ respect for fallen state troopers by erecting roadside memorial crosses as government endorsement of religion.

American Atheists challenge the District Court’s determination that Utah’s grant of permission to UHPA to erect memorial crosses bearing the Utah Highway Patrol logo on state-owned rights of way was neither intended to, nor had the effect of endorsing religion, despite the uncontested facts that neither Utah nor UHPA expressed an intent to endorse religion. Instead, American Atheists base their challenge on the premise that the Latin cross is an exclusively religious symbol.

Further, American Atheists advocate an unduly restrictive interpretation of the objective observer element of Establishment Clause jurisprudence. Both positions are contrary to established precedent and the record before the District Court.

II. ARGUMENT

The Establishment Clause of the First Amendment provides, “Congress shall make no law respecting an establishment of religion” U.S. CONST., amend. I. This limitation applies also to the “legislative power of the States and their political subdivisions” as a result of the Fourteenth Amendment. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000). “At its core, the Establishment Clause enshrines the principle that government may not act in ways that aid one religion, aid all religions, or prefer one religion over another.” *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1230 (10th Cir. 1998) (quotation omitted).

As this Court has recently reiterated, the Tenth Circuit applies a hybrid Establishment Clause test based on the Supreme Court’s opinion in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), as modified by Justice O’Connor’s concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O’Connor, J., concurring). *Weinbaum v. City of Las Cruces*,

541 F.3d 1017, 1030 (10th Cir. 2008). The hybrid test has three prongs: 1) whether the government intended to endorse religion; 2) whether the conduct has the effect of endorsing religion, or 3) whether the government's involvement with a religious institution excessively entangles the state with religion. *Id.*; *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1222 (10th Cir. 2005).

American Atheists challenge Utah's decision to allow the trooper memorials under the first and second prongs of the modified *Lemon* test.³ Their challenge is predicated on four arguments that transcend both prongs: 1) that Utah adopted or was otherwise responsible for the content of UHPA's memorials; 2) that the Latin cross is an exclusively religious symbol; 3) that the use of a Latin cross by a State is per se an establishment of religion; and 4) that a reasonable observer would not be aware of a non-religious memorial function of roadside crosses and would evaluate those crosses based on a fleeting encounter. However,

³ The excessive entanglement prong is applicable to where the government confers benefits on religious "institutions" or "authorit[ies]." *Lemon*, 403 U.S. at 615; see *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1261 (10th Cir. 2005) (analyzing sale of easement to Church of Jesus Christ of Latter-Day Saints for excessive entanglement). Because UHPA is not a religious institution, the third-prong of the modified *Lemon* test is inapplicable to this case.

these arguments ignore the evidence presented to the District Court, and recent Establishment Clause precedent.

A. The Trooper Memorial Crosses Are the Expression of UHPA Not the State of Utah

An “Establishment Clause violation must be moored in government action of some sort.” *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 779 (1995) (O’Connor, J., concurring). In their attempt to argue an Establishment Clause violation, American Atheists, and supporting *Amici*, misattribute UHPA’s actions in constructing the memorials to the Utah Department of Transportation and thereby the State of Utah. *See, e.g.*, Appellants’ Br. at 24 (“This lawsuit was filed because Utah participated in and endorsed the religious expression of UHPA and/or that speech has become the expression of the State.”). Contrary to this characterization, the District Court correctly observed that the only state action at issue in this case is Utah’s grant of permission (i) for the Utah Highway Patrol logo to appear on the memorials; and (ii) for the memorials to be placed on state-owned land. *American Atheists, Inc. v. Duncan*, 528 F. Supp. 2d 1245, 1254 (D. Utah 2007). Utah took no part in funding, designing or selecting the memorials, and the memorials were erected by the

UHPA, a private non-profit corporation. *Id.* at 1248-51. In short, Utah’s action in this case is limited to allowing a private organization the freedom to memorialize fallen state troopers.

The distinction between the conduct of UHPA and Utah is significant because it underscores the limit of the Utah’s purpose underlying its actions—allowing the private commemoration of state troopers.⁴ Despite American Atheists’ best efforts to argue otherwise, allowing private citizens to erect memorials, whether or not the memorials can be construed as having some religious significance, does not violate the Establishment Clause. *See Capital Square*, 515 U.S. at 765 (“there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect”).

American Atheists’ failure to account for the role of UHPA in determining the form of the trooper memorial crosses also ignores the First Amendment Free Expression rights of UHPA and its members.

⁴ American Atheists concede this is a valid secular purpose. *See* Appellants’ Br. at 26 (“Government honoring law enforcement officers is a secular purpose and well within constitutional bounds”).

Assuming that any use of a Latin cross constitutes an expression of religious belief, American Atheists concede the inclusion of crosses on “government issued tombstone[s]” in “a government owned cemetery” does not constitute government endorsement of religion. American Atheists’ attempt to differentiate roadside memorials from grave markers on the basis that roadside memorials are placed “on government property not set aside generally for private expression.” (Appellants’ Br. at 45.) Yet this distinction fails to offer American Atheists the support they seek.

While American Atheists may be correct that roadside easements and rest-areas are non-public fora, *see Jacobsen v. Bonine*, 123 F.3d 1272, 1274 (9th Cir. 1997) (holding that perimeter walkways of interstate rest areas are not public fora); *San Diego Minutemen v. California Bus., Transp & Housing Agency’s Dep’t of Trans.*, No. 08-210, 2008 WL 2781138, at *17-18 (S.D. Cal. June 27, 2008) (holding roadside segment subject to adopt-a-highway program was a non-public forum), so are government-owned cemeteries. *See Warner v. City of Boca Raton*, 420 F.3d 1308, 1310 n.1 (11th Cir. 2005); *Griffin v. Sec’y of Veterans Affairs*, 288 F.3d 1309, 1322 (Fed. Cir. 2002); *Warren v.*

Fairfax County, 196 F.3d 186, 201 (4th Cir. 1999); *Jackson v. City of Stone Mountain*, 232 F. Supp. 2d 1337, 1353 (N.D. Ga. 2002).

In either forum, a State may not discriminate in its grant of access to a private individual or group based solely on the content of that individual or group's message. *See Cornelius v. NAACP*, 473 U.S. 788, 799-800 (1985) (holding that “[a]ccess to a nonpublic forum . . . can be restricted as long as the restrictions are reasonable and [are] not any effort to suppress expression merely because public officials oppose the speaker's view”); *Robb v. Hungerbeeler*, 370 F.3d 735, (8th Cir. 2004) (holding that a State may not restrict access to adopt-a-highway sign program based on viewpoints or beliefs of applicants); *Jackson*, 232 F. Supp. 2d at 1353 (holding that a city may impose a regulation restricting speech in a public cemetery only if it “is reasonable and viewpoint neutral). The prohibition on viewpoint restrictions applies with even more force in the case of roadside memorials if roadside easements are determined to occupy a position as designated public fora where speakers are entitled to increased protection.

In effect, American Atheists' position denies States the ability to allow limited speech along roadside easements, subject only to

reasonable time, place or manner restrictions.⁵ Instead, a State, such as Utah, would either have to completely ban the erection of roadside memorials or occupy the forum by prescribing an approved standard memorial.⁶

Finally, as private speech on public land, there is no evidence that the trooper memorial crosses have a coercive effect on observers, which can serve as a determining factor in Establishment Clause jurisprudence. *See Lee v. Weisman*, 505 U.S. 577, 588 (1992) (“[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . .”); *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 662 (1989) (“[a]bsent coercion the risk of infringement of religious liberty by passive or symbolic accommodation is minimal”); *Roberts v. Madigan*, 921 F.2d 1047, 1053 (10th Cir. 1990) (describing the difficulty under the

⁵ Texas, for example, provides a licensing process for establishing and maintaining private memorials to officers killed in the line of duty. *See* 43 TEX. COD ANN. § 22.17. New Mexico allows private memorials and makes it illegal to deface or destroy private memorials. *See* N.M. STAT. ANN. § 30-15-7

⁶ Colorado and Wyoming allow only standardized memorials, *see* COLO. REV. STAT. § 43-2.149; Wyoming Dept. of Trans. Policy at <http://dot.state.wy.us/Default.jsp?sCode=infrm> (last visited October 22, 2008), with Wyoming going so far as to remove non-standard memorials.

Establishment Clause “of determining the proper balance between the freedom from religious coercion created by state-sponsored religion and the inescapable reality that our culture is permeated by religious symbols and rituals”); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, (10th Cir. 1973) (noting that passive Ten Commandments display on courthouse grounds was non-coercive “unless one considers it coercive to look upon” them). *See also* Michael McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986). Even if American Atheists are correct that a fleeting reasonable observer would find the trooper memorial crosses convey a religious message, there is no evidence that such a fleeting encounter would have a coercive effect on the observer.

B. The Latin Cross Is Not An Exclusively Religious Symbol

American Atheists argue that “[a]ny secondary or secular meaning of a Roman cross is derivative from the overwhelming and longstanding religious meaning – the symbol of the death of Jesus Christ.” (*Id.* at 50 n.22.) Amicus AHA similarly argues the Latin cross is “an inherently Christian symbol,” and that “[n]othing inherent in the shape of a Latin

cross communicates a message of death and remembrance.” (AHA Amicus Br. at 5.)

Yet the materials presented to the District Court and cited by AHA undermine this conclusion. The shape of the Latin cross inherently signifies an instrument of death, and was regarded as such before the crucifixion of Jesus. *See* HOLLY EVERETT, *ROADSIDE CROSSES IN CONTEMPORARY MEMORIAL CULTURE*, 23 (1st ed. 2002) (“Prior to the infamous execution [of Jesus], crosses were understood as threatening symbols of Roman power and punishment. The cross carried extremely negative associations, then, not only for Christians, but for Jews and other groups alike who had suffered under Roman rule.”). The Latin cross thus inherently represents at least capital punishment, if not death more broadly. It acquired a secondary meaning upon its adoption by many Christians as a symbol of their faith. This subsequently acquired meaning, however prevalent, does not negate the Latin cross’ initial and continuing status as a symbol of death.

The Latin cross’ association with death and remembrance is reinforced by the prevalence of its use as a grave-marker. In addition to the examples cited by the court in *Trunk v. City of San Diego*, 568

F.Supp. 2d 1199, 1214-16 (S.D. Cal. 2008), large memorial crosses are commonly displayed on federal property. As established in the record before the District Court, Arlington National Cemetery's Argonne Memorial, the Canadian Cross of Sacrifice, and the over 100 gravesites, including that of Robert F. Kennedy, are marked by a Latin cross. (Aplt. App. at 1952.) Likewise, at Gettysburg National Military Park, the Irish Brigade Monument is marked by an ornate Latin cross, and a cross is used to memorialize soldiers who suffered the Bataan Death March during World War II on municipal property at the Taos Plaza in New Mexico. *Trunk*, 568 F. Supp. 2d at 1215-16. Crosses are also similarly used in other places throughout the world, such as Flanders Field in the Netherlands (World War I) and Normandy, France (World War II) to memorialize death and sacrifice. (Aplt. App. at 2363-67.)

American Atheists try to engineer a factual error on the part of the District Court by conflating the court's statement about the presence of crosses in "American military cemeteries," with the court's separate finding that "[c]emeteries throughout the United States, including cemeteries in Utah, display row upon row upon row of crosses to mark the burial spot of those who served their community and their

country.” *American Atheists*, 528 F. Supp. 2d 1257; *contra* American Atheists’ Appellate Br. at 56 (characterizing the district court’s order as making an “unsupported determination of ‘row-upon-row of crosses’ found in *military* ‘cemeteries throughout the United States and in Utah”) (emphasis added).

While the District Court noted the fact that “American military cemeteries display crosses to represent the death of public servants,” the court did not state that those “American military cemeteries” containing such crosses were located on United States soil. In fact, in support of its assertion, the court cited to photographs in the record of American military cemeteries from WWI or WWII that are located in Belgium, England, France, Italy, Luxemburg, the Netherlands, the Philippines or Tunisia. *American Atheists*, 528 F. Supp. 2d at 1257 (citing Ex. 1, Photographs A – X filed in support of UHPA’s motion for summary judgment).⁷ As conceded by American Atheists, such

⁷ Contrary to the position of Amici AUSCS, the District Court did not “misunderst[a]nd the practice that it invoked” when it noted the practice of marking military cemeteries with crosses. (AUSCS Amicus Br. at 15.) The Department of Veterans Affairs policies on the provision of memorial markers and the use of religious symbols apply to “national cemeteries,” which are governed by the National Cemetery Administration. *See* 38 U.S.C. § 2400; 38 C.F.R. § 38.630(c). The examples of cemeteries relied on by the District Court in the quoted passage appear to be American military

cemeteries do contain row upon row of crosses (Appellants' Br. at 56), and are administered by the American Battle Monuments Commission, which was established by the Congress in 1923 as an agency of the Executive Branch of the Federal Government. *See Trunk*, 568 F. Supp. 2d at 1215 (noting that in ABMC administered cemeteries "the cross was adopted as the default gravestone"); *Lucas v. United States*, 25 Cl. Ct. 298, 300 (Cl. Ct. Feb. 14, 1992) ("The ABMC is a federal commission which is responsible for commemorating, through battle monuments, the services of the American Armed Forces since World War I"). However, American Atheists provide no justification for why a reasonably informed observer would not be aware of the extensive use of Latin crosses in American cemeteries abroad,⁸ or why their location in a foreign country affects the analysis.

cemeteries located abroad and governed by the American Battle Monuments Commission. *See* 36 U.S.C. §§ 2101-2106; 36 C.F.R. § 400-01.

⁸ Ignorance of the use of crosses in American cemeteries overseas is especially unlikely given "the generic use of crosses as grave markers . . . in literature, cinema and the visual arts" as noted by the court in *Trunk*, 568 F. Supp. 2d at 1215, n.19. As the court described, various famous depictions of Latin crosses as grave-markers in American military cemeteries abroad include John McCrae's poem, "In Flanders Fields," John Atherton's WWII poster, A CARELESS WORD (OWI Poster No. 23), and the recent film SAVING PRIVATE RYAN (DreamWorks SKG 1998). *Id.*

Nor is the use of the Latin cross as a symbol for death and remembrance limited to gravesites. For example, Veterans for Peace, a national organization of military veterans who oppose the war in Iraq, organizes “well-publicized exhibits on public beaches and in public parks erecting thousands of crosses to represent the number of U.S. military dead in Iraq.” *Trunk*, 568 F. Supp. 2d at 1213. “In the anti-war context of the displays,” the *Trunk* Court observed, “the crosses alternatively symbolize the cost of war, sacrifice and honor, and repose in death—specifically, military death.” *Id.*

Not only do American Atheists overlook the use of the Latin cross as a grave marker, but they also ignore the prevalent use of Latin crosses as roadside markers for traffic fatalities. Although there do not appear to be any nationwide statistics for roadside markers, estimates range as high as 8,500 markers erected each year.⁹ One localized study

⁹ See Deborah Sharp, *Battles Over Roadside Shrines More Common*, USA TODAY (July 11, 2005), available at: http://www.usatoday.com/news/nation/2005-07-11-roadside-memorials_x.htm, (last accessed October 22, 2008) (noting that there were 42,800 traffic fatalities in the United States in 2004 and that a Maryland Department of Transportation study estimated that markers are erected after 10% to 20% of fatal crashes); Ian Urbina, *As Roadside Memorials Multiply, a Second Look*, THE NEW YORK TIMES (Feb. 6, 2006), available at: <http://www.nytimes.com/2006/02/06/national/06shrine.htm>, (last accessed October 22, 2008) (noting same statistics and study).

further revealed that approximately 93 percent of roadside memorials prominently featured crosses. *See Andrew J. McClurg, Dead Sorrow: A Story About Loss and a New Theory of Wrongful Death Damages*, 85 B.U. L. REV. 1, 51 n.221 (2005 (city study of seventy-eight roadside memorials in Texas and Oklahoma found that a cross was featured prominently in seventy-three of the sites) (Jon K. Reid & Cynthia L. Reid, *A Cross Marks the Spot: A Study of Roadside Death Memorials in Texas and Oklahoma*, 25 DEATH STUDIES 341, 343 (2001)). Additionally, at least two states, Montana and Texas, allow private organizations to erect roadside crosses at the scene of traffic fatalities.¹⁰ These programs, along with the above rough estimates, point to the prevalence of roadside markers in general and roadside crosses in particular as private memorials erected in honor of an individual who was killed at that location

¹⁰ Montana allows the American Legion to erect roadside memorial crosses at the location of a traffic fatality, while Texas allows Mothers Against Drunk Driving to erect memorial crosses for fatalities throughout most of the State. *See* HOLLY EVERETT, ROADSIDE CROSSES IN CONTEMPORARY MEMORIAL CULTURE at 15, 29, 111-18, 122; *see also* American Legion Highway Fatality Marker Safety Program information available at <http://www.mtlegion.org/programs/Marker.html> (last visited October 22, 2008) (describing American Legion roadside marker program and estimating that over 2,000 roadside markers had been placed by).

Given the prevalence of roadside memorial crosses and American Atheists' argument regarding the fleeting observance of the trooper memorial crosses, there is no indication that the reasonable observer would be able to discern the state trooper logo, identify the cross as located on state-owned land or conclude that the trooper memorial crosses were anything other than a privately sponsored memorial.

C. The Use Of A Latin Cross Is Not Per Se An Establishment Of Religion

American Atheists argue that displays or memorials containing Latin crosses should be analyzed differently from displays containing other religious symbols or texts. (Appellants' Br. at 28.) They contend that the Court need not engage in an analysis of the context in which the cross is displayed, but rather, should summarily conclude that the Latin cross is necessarily a religious symbol incapable of conveying a secular message. (*Id.* at 28-30.) Amicus AHA similarly argues that "the Latin cross is an inherently religious symbol, and it is being used as a religious symbol by the State of Utah in this case." (AHA Br. at 17.)

Yet both the Supreme Court's and this Court's Establishment Clause jurisprudence reject any such categorical treatment of a symbol; even one with an inherently religious meaning. Where a symbol has

both a secular and a religious meaning, a court may not focus exclusively on the religious meaning, *Lynch v. Donnelly*, 465 U.S. 468, 679-82 (1984) (“[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause”), but rather must focus on the context in which the symbol is used to determine whether it is intended as a religious or secular message. *Van Orden v. Perry*, 545 U.S. 677, 701 (2005) (“to determine the message that the [religious] text here conveys, we must examine how the text is used. And that inquiry requires us to consider the context of the display”) (Breyer, J., concurring in the judgment).

This Court’s recent decision in *Weinbaum* stressed the importance of context in determining whether a challenged activity runs afoul of the First Amendment and expressly cautioned against attempts to frame “per se rule[s]” or apply “mechanical rule[s].” *Weinbaum*, 541 F.3d at 1033, 1039 (quoting *Lynch*, 465 U.S. at 678). In *Weinbaum*, the Court upheld the City’s use of three crosses as a municipal symbol in various contexts, including a public school. 541 F.3d at 1033-38. In particular, one of the contextual facts that rendered the City of Las Cruce’s city seal permissible was its affiliation with the City’s name,

which was in turn based off of “a series of secular events that occurred near the site of the City,” namely the erection of crosses to mark the sites where various groups of travelers had been killed. *Weinbaum*, 541 F.3d at 1035. Given this context, the Court held that “it is hardly startling that a City with the name “The Crosses” would be represented by a seal containing crosses,” and that “the name of City *reflected merely the cemetery, representing violence in the area rather than proselytizing forces in general or a particular faith.*” *Id.* (emphasis added).

In upholding the City’s use of a Latin cross as a municipal symbol, the Court rejected the argument that the Latin cross is an exclusively religious symbol. *Weinbaum*, 541 F.3d at 1022 & n.2 (observing that while the Latin cross “is unequivocally a symbol of the Christian faith,” it is “not exclusively so”). This Court’s conclusion is consistent with the court’s in *Trunk v. City of San Diego*, which upheld the use of a 29-foot tall Latin cross as part of a veterans memorial. There the court held that while “[t]he Latin cross is, to be sure, the preeminent symbol of Christianity, but it does not follow the cross has no other meaning or significance. Depending on the context in which it is displayed, the

cross may evoke no particular religious impression at all.” 568 F. Supp. 2d at 1213.¹¹

In reaching its decision, the *Trunk* court rejected a similar argument to the one advanced by American Atheists and Amici AHA and AUSCS in this case. Specifically, the plaintiffs in *Trunk* argued that “displays with crosses ought to be analyzed differently from displays with other religious symbols or texts,” and that “the Latin cross necessarily conveys an exclusively religious message.” *Trunk*, 568 F. Supp. 2d at 1213. The court rejected plaintiffs’ argument and explained that “[u]nder Plaintiffs’ analysis, no idiom is safe.” *Id.* at 1214. The practical effect of adopting such an argument would mean that “a religious allusion or symbol could never be used to convey a secular meaning . . . because any such reference would necessarily rely on underlying religious belief or doctrine.” *Id.* The court then noted

¹¹ The *Trunk* Court also specifically noted that “contrary to Plaintiffs’ suggestion, precedents dealing with public displays of crosses in the Establishment Clause context suggest Latin crosses should not be assumed to be primarily or exclusively religious symbols.” *Trunk*, 568 F. Supp. 2d at 1213. *See also Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (Thomas, J., concurring) (observing that erection of a cross could be a “political act, not a Christian one”); *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 626 n.12 (9th Cir. 1996) (O’Scannlain, J., concurring) (“[w]hile a crucifix is an unmistakable symbol of Christianity, an unadorned Latin cross need not be”).

that such a position would be inconsistent with the results reached by the Supreme Court in *Van Orden*, *Lynch* and *Allegheny*, where the Court upheld the use of monuments and symbols that had a clear but not exclusive religious meaning. *Id.*

Of course, a Latin cross can convey a religious message and courts have found that it is often used to do so. Latin crosses have been found to convey a state-sanctioned religious message where it was contained in an official governmental seal where additional factors made the religious connection explicit. *See Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1995); *Friedman v. Board of County Commissioners of Bernalillo County*, 781 F.2d 777, 782 (10th Cir. 1985) (invalidating county seal containing Latin cross with light beams radiating from it and coupled with the motto “With this we conquer”); *Harris v. City of Zion*, 927 F.2d 1401, 1414 (7th Cir. 1991) (invalidating city seal featuring a Latin cross, a dove, and a crown with scepter, with the words “God Reigns”). They have also been found to convey a religious message when they move beyond an unadorned cross and are more directly and exclusively associated with a Christian message, such the use of a crucifix is used to depict Jesus’ crucifixion. *See Gonzales v.*

North Township of Lake County, Indiana, 4 F.3d 1412, 1421 (7th Cir. 1993).

But, as recognized by this Court, a Latin cross need not always convey a religious message, and certainly not exclusively so. In *Weinbaum*, the Court confirmed this approach by distinguishing *Robinson and Bernalillo* from the Las Cruces city seal before it. The Court distinguished *Bernalillo* because the seal at issue contained a display of a radiant Latin cross with the motto “With This We Overcome” clearly meant “that the County shall overcome with the power of the Christian cross.” *Id.* at 1034. The Court also distinguished the cross the seal at issue in *Robinson* ran because it was “an unambiguous religious symbol” due to the fact it was purportedly included in the seal to reflect the area’s Christian heritage. *Weinbaum*, 541 F.3d at 1035. Thus, as recognized by this Court in *Weinbaum*, these cases were based on contextual determination and stop short of holding that an otherwise unadorned Latin cross (or a Latin cross adorned with secular messages) is *per se* incapable of having any non-religious significance. *Weinbaum*, 541 F.3d at 1033-35.

The contextual approach applied by the Court in *Weinbaum* is equally applicable to this case and is more consistent with the District Court’s analysis than the arguments advanced by American Atheists and Amici AHA and AUSCS. There are no facts in this case to elevate the use of a memorial cross beyond its historical and secular association with memorials to the dead.

D. A Reasonable Observer Would Not Find the Trooper Memorial was State Endorsement of Religion

Both the first and second prongs of the modified *Lemon* test involve an objective inquiry into the purpose and effect of the government’s conduct. *Weinbaum*, 541 F.3d at 1031. An “objective observer” is presumed to be familiar with the “text, legislative history, and implementation of the statute, or comparable official act,” *McCreary*, 545 U.S. at 862; *see also O’Connor*, 416 F.3d at 1225, as well as “the purpose, context, and history of the symbol,” *Weinbaum*, 541 F.3d at 1031, and is not “not limited to ‘the information gleaned simply from viewing the challenged display.’” *O’Connor*, 416 F.3d at 1228 (quoting *Wells v. City & County of Denver*, 257 F.3d 1132, 1142-43 (10th Cir. 2001)). Further, the objective observer is familiar with the history of the local community, the forum at issue, press releases

relating to the dispute, informational materials regarding the challenged conduct or display, and the undisputed facts of the case. *See Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995); *Fleming v. Jefferson County School Dist. R-1*, 298 F.3d 918, 930 (10th Cir. 2002); *O'Connor*, 416 F.3d at 1228; *Trunk*, 568 F. Supp. 2d at 1212.

Despite presumptions underlying the well-informed objective observer, American Atheists contend that a fleeting motorist would see is a large white cross with the UHP logo and conclude Utah had endorsed any religious message in the trooper memorial. (Appellant's Br. at 18.) Yet to reach the result American Atheists seek, this putative fleeting observer must be well-informed enough to be aware of the historic association of the Latin cross as the preeminent symbol of Christianity, Utah's approval of the placement of the trooper memorials and that the trooper memorials are located on public-owned easements (as opposed to adjacent private land, but simultaneously ignorant of the secular use of the Latin cross as grave markers and roadside memorials, UHPA's published statements regarding its responsibility for the content and creation of the roadside markers and Utah's express

denial of responsibility for the content of the memorials. Similarly, American Atheists' fleeting observer must have enough time to see the Utah Highway Patrol logo, but not have enough time to notice the biography providing an explanation for the memorial's existence. *See* Appellants' Br. at 37-38.

In short, American Atheists' proposed fleeting observer standard is an attempt to selectively circumvent the presumptive knowledge imputed to the objective observer. Such a selective interpretation of the standards does not "encourage those who would challenge government conduct to investigate the conduct carefully." *Weinbaum*, 541 F.3d at 1031, n. 16.

CONCLUSION

For the forgoing reasons, the District Court's order granting summary judgment in favor of Defendants Scott T. Duncan, John Njord, D'Arcy Pignanelli, F. Keith Stepan and Intervenor-Defendant UHPA should be affirmed.

Dated this 22nd day of October 2008

Respectfully submitted,

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As required by Fed. R. App. P. 31(a)(7)(c), I certify that this brief is proportionally spaced and contains 4,916 words. I relied on my word processor to obtain the count and it is Microsoft Office Word 2003.

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