

Appeal No. 08-4061
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMERICAN ATHEISTS, et al.,

Plaintiffs-Appellants,

vs.

DUNCAN, et al.,

Defendants-Appellees,

UTAH HIGHWAY PATROL ASSOCIATION

Defendant-Intervenor-Appellee

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

Brief of *Amicus Curiae* Utah Sheriffs' Association in Support of Appellees

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Rule 26.1 CORPORATE DISCLOSURE STATEMENT

The Utah Sheriffs' Association is a non-profit Utah corporation which has no shareholders.

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**IDENTITY AND INTEREST OF THE AMICI CURIAE --
UTAH SHERIFFS' ASSOCIATION**

This amicus curiae brief is being filed by the Utah Sheriffs' Association.

The Utah Sheriffs' Association is a non-profit corporation organized under section 501(c)(3) of the Internal Revenue Code. The corporation is dedicated to serving the legitimate needs of Utah Sheriffs to assist them in carrying out the mission of public safety. The Utah Sheriffs' Association raises funds to provide extensive training. This includes funding the Jail Commanders Certification Academy, funding in-service jail training,¹ funding in-service law enforcement training, coordinating the national Child ID program, assisting Sheriffs with the TRIAD program for senior citizens, funding and operating the Utah Sheriffs' Association's Jail Auditing system, developing model standards for Utah Jails, and participating in a national law enforcement agenda through the National Sheriffs' Association, and the Western States Sheriffs' Association.

The Utah Sheriffs' Association is desirous of honoring the law enforcement officers that it represents who have been killed in the line of duty. As such, the Utah Sheriffs' Association has an interest in defending the rights of law enforcement associations wishing to memorialize these sacrifices.

¹ Said training is over one hundred hours per year.

STATEMENT OF ISSUES

Does a cross commemorating a fallen Utah Highway Patrol officer violate the Establishment Clause when it is located on government property?

STATEMENT OF FACTS

The Utah Highway Patrol Association wishes to commemorate its officers who have fallen while performing their duties. As such, it erected a twelve foot memorial cross which has the Highway Patrol beehive logo, the name, badge number, rank and date of death of the officer that was killed. In addition there appears an eight by five inch plaque with the officer's photograph, the date he or she joined the Highway Patrol, and the circumstances of death. The Utah Department of Transportation has permitted the erection of the memorial crosses on its property.

Individual Plaintiffs have direct, frequent and unwelcome contact with the crosses. As such, they, along with the American Atheists, Inc., brought suit against individual government officials for violation of Article I, Section 4 of the Utah Constitution as well as the First Amendment's Establishment Clause. The District Court granted the Utah Highway Patrol Association's motion to intervene.

The essence of the Defendants/Appellants' claim is that a cross is exclusively religious.

SUMMARY OF ARGUMENT

A cross appearing on public property, commemorating the death of a fallen officer, does not violate the Establishment Clause because, in context, the cross communicates a civic message. State actors can borrow religious symbolism to educate the public when the symbol has a similar meaning to the government's civic message. As such, stand alone crosses are not, as a matter of law, exclusively religious symbols. Hence, the existence of a memorial cross on government property does not run afoul of the Establishment Clause because of the cross' pedagogical nature.

ARGUMENT

a. State actors can use religious symbols to convey civic messages without running afoul of the Establishment Clause.

The District Court noted that “symbols are capable of simultaneously carrying multiple meanings.” American Atheists v. Duncan, 528 F.Supp. 1245 at 1256 (D. Utah 2007) footnote 6. Of course, the trial court does not speak alone. ““The government may depict objects with a spiritual content”” provided that the state 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)). Indeed, the U.S. Supreme Court has found that classic religious symbols may have a variety of meanings, depending on their

context. “Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.” Van Orden v. Perry, 545 U.S. 677, 690-91 (2005).

State actors can and do communicate a variety of civic messages via religious symbolism. It is the Utah Sheriffs’ Association’s position that when the primary intent of the symbol is pedagogical, no Establishment Clause violation is present.

Indeed, there are numbers of examples of the use of religious symbolism to convey a civic message which withstand judicial scrutiny. Courthouses themselves communicate such messages. There are numerous cases in which the Ten Commandments have been displayed on or around courthouses.² A fair summation of such cases is that the lawfulness of the Decalogue depends on the context and purpose of the display. Put another way, no matter the constitutional test used, it is generally the state messaging which determines the constitutionality.

In addition to the Decalogue, a ubiquitous religious symbol found at courthouses is the Goddess of Justice, also known as Lady Justice. The Goddess of Justice is depicted as a woman standing on a pedestal, holding in her right hand

² See, McCreary County, Ky. v. American Civil Liberties Union of Ky., 545 U.S. 844 (2005); Van Orden v. Perry, 545 U.S. 677 (2005); Stone v. Graham, 449 U.S. 39 (1980); Card v. City of Everett, 520 F.3d 1009 (9th Cir. 2008).

the sword of authority, while in the left hand she holds poised a pair of scales emblematic of the Scales of Justice.

The mythology of Greece and Rome teaches us that this Goddess of Justice [was] blind when she poised her scales; blind to hatred, revenge and vengeance; blind to passion, prejudice and partisanship; blind to everything except those things that pointed unerringly to the everlasting truth.

Suhre v. Haywood County, 55 F. Supp. 2d 384, 387 (W.D.N.C. 1999).

As Her name implies, She is a deity and was worshipped by those who believed in Her presence and power. The image of the Goddess of Justice is a religious, and indeed a highly sectarian, symbol. However, Her image has been adopted by the government. Courts use Her to communicate to the public the functions of the judiciary. For example, the scales weigh the merits of a matter, much as a judge or jury. She is blindfolded to provide equal treatment under the law, regardless of wealth, race, or other characteristics. The sword in Her hand represents authority. In like manner, the courts have the authority to decide matters, even life and death.

In addition to the Goddess of Justice, there are numerous examples of religious symbols and ceremony that state actors use to communicate messages. For the sake of brevity, *amicus* will provide just one more to

further illustrate this point. The County of Los Angeles, California, used a seal which displayed a cross, the Roman Goddess Pomona, engineering instruments, the Spanish galleon San Salvador, a tuna, a cow, the Hollywood Bowl, two stars³ and oil derricks. Vasquez v. County of Los Angeles, 487 F.3d 1246, 1248 (9th Cir. 2007). A lawsuit was brought challenging the replacement of the cross with a Catholic mission (Mission San Gabriel). The complainant asserted that this somehow showed hostility to Christianity, something the Ninth Circuit ultimately rejected.

Of course, it is self evident that the mission is more of a sectarian symbol than a Latin Cross in that the church (mission) is clearly Roman Catholic⁴ whereas a cross is used by most Christian denominations.

American Atheists v. Duncan, 528 F.Supp. 1245 at 1255. The presence of the mission was found constitutional. And, although the County replaced the Latin Cross with the mission for fear of an Establishment Clause violation, the Ninth Circuit declined to provide an advisory opinion as to whether the prior religious symbols would violate the Establishment Clause.

It is *amicus*' position that if the mission is constitutional, then the

³ The stars represent the County's television and motion picture industries. Vasquez, Id., 1248.

Latin Cross would also not transgress the First Amendment because the former is more sectarian than the latter. Be that as it may, the two symbols serve an educational purpose along with the other items in the County's seal. They teach that Los Angeles was founded by Catholic Franciscans and the Mission San Gabriel is a part of the chain of missions that were established by Catholic missionaries centuries ago. The presence of what is admittedly a highly sectarian item on the seal teaches something of the history of Los Angeles County and thus does not constitute an establishment of religion.

It may be protested that certain persons within the faith community will be benefited when state actors use religious symbols. For example, different groups receive some sort of spiritual windfall from the display of religious depictions, e.g., Catholics from the display of a mission; followers of the Greco-Roman pantheon benefit from the Goddesses of Justice and Pomona; Jews benefit from the Decalogue; Christians from a cross. This objection is without merit in that the purpose of borrowing these religious symbols is to convey a civic message. There is no intent in the government's messaging to communicate something spiritual, take sides in a theological debate, or to otherwise establish a religion. At best, the benefit to people of particular faiths is *de minimus*, if at all. As such, the view that

⁴ In a confused attempt to "avoid a potential violation of the Establishment Clause" (Vasquez, *Id.*, 1255), the County of Los Angeles removed the cross as well as the

use of religious symbolism to communicate a civic message is a violation of the separation of church and state is specious.

Turning the analysis specifically to the cross, this symbol, though religious, does not communicate an exclusively religious message. As a religious symbol, the cross represents Christianity and the death and resurrection of Jesus Christ. In Christian theology it is a multifaceted symbol but primarily communicates Christ's sacrifice of His life whereby He pays the penalty for the sin of the world.

In a civic sense, the meaning of the cross is borrowed such that it communicates sacrifice for the benefit of others. The cross is frequently used to solemnize and honor those in the military who have, as President Lincoln stated, given "that last full measure of devotion."⁵ Hence, the death of one killed in war has a redemptive purpose. That purpose may include: sacrifice for the greater good; protection of others; preservation of liberties at the price of blood. In other words, this person's death is not meaningless.

The government borrows the religious symbol of the cross to communicate that civic message. Typically the military, or those wishing to honor military dead, uses the religious symbolism as a simple pedagogical

Goddess Pomona.

tool to convey a civic message. This is similar to the way that the judiciary uses Lady Justice, a sectarian religious symbol, to communicate the purposes of the courts.

The factual record before this Court is consistent with that understanding.

The stated purpose of the UHPA is: a. To memorialize troopers who died in the line of service; b. Remind the traveling public of the service and sacrifice of the troopers on the highways and elsewhere in Utah; c. Remind the traveling public to drive safely and vigilantly.

American Atheists v. Duncan, 528 F.Supp. at 1248-49.

Although UHPA is a non-profit organization, the claim is that the crosses are on property owned and controlled by the Utah Department of Transportation. Even though it is not clear from the record, it is apparently being argued by the Defendants/Appellees that the Department has thus adopted as its own the message that it allows on its property.

But even if that is true, for the reasons discussed in this brief, no violation of the Establishment Clause is present. Indeed, *amicus* proffers

⁵ A. Lincoln, Gettysburg Address, 1 Documents of American History 429 (H. Commager ed.) (9th ed. 1973).

that even if the memorial crosses were erected and paid for by the Department, the analysis would not change in any material way. Nor does it matter, for constitutional review, that the cross is not used by the majority religion (Church of Jesus Christ of Latter Day Saints) in Utah. When the government uses a religious symbol to communicate a civic message, it is not establishing a religion in any real sense that the drafters of the First Amendment understood.

CONCLUSION

The government does not transgress the restrictions under the Establishment Clause when it borrows a religious symbol to communicate a civic message. Such use of a religious symbol is pedagogical in nature. As to the memorial crosses at issue, the record shows that there is no intent in the government's messaging to convey something spiritual, take a position in what is a theological dispute, or to otherwise establish a religion (e.g., a church). Instead, the cross is shorthand for communicating the civic message that the death of a fallen officer is sacrificial and thus has redemptive purpose, something that is worthy of honor and reflection. Therefore, the Utah Sheriffs' Association requests that this Court affirm the District Court in finding that the presence of a memorial cross on public property

does not violate the Establishment Clause.

Respectfully submitted this 24th day of October, 2008.

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

1. This brief complies with the type-volume limitation of FRAP 32(A)(7)(B) in that it contains no more than 14,000 words. According to Microsoft Word's "Statistics," this document contains 2801 words.

2. This brief complies with the typeface requirements of FRAP 32(a)(50) and the type style requirements of FRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 Times New Roman 14 point type.

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CERTIFICATE OF SERVICE

I, Kevin T. Snider, hereby certify that on October 24, 2008, I emailed a copy of the foregoing Amicus Brief of the Utah Sheriffs' Association to the following:

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