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,
Intervenor-Defendant-Appellee.

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

UTAH HIGHWAY PATROL ASSOCIATION INTERVENOR-DEFENDANT APPELLEE'S PETITION FOR REHEARING EN BANC

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PETITION FOR REHEARING EN BANC

Extraordinary cases merit extraordinary review. Intervenor-Defendant-Appellee Utah Highway Patrol Association (UHPA) therefore petitions this Court to rehear the case en banc per Fed. R. App. P. 35 and 10th Cir. R. 35.

The panel opinion in this case held that thirteen memorial crosses honoring fallen Utah Highway Patrol troopers violated the federal Establishment Clause by "endorsing" Christianity. (See Ex. A, *American Atheists v. Duncan*, No. 08-4061 (10th Cir. Aug. 18, 2010) ("Slip Op.").) Yet Justice Kennedy recently pointed out that a "cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as a statement for governmental support for sectarian beliefs." *Salazar v. Buono*, 130 S. Ct. 1803, 1818 (2010) (plurality). Undoubtedly, he was referring to *Duncan*, given that the UHPA filed an amicus brief in *Salazar*. (See Ex. B, April 30, 2010 Rule 28J letter, Dkt. No. 9758983.) And while Justice Kennedy's comment is dicta, this Court is "bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements." *Gaylor v. United States,* 74 F.3d 214, 217 (10th Cir. 1996) (citation omitted).

If Justice Kennedy is correct, then *Duncan* is likely wrongly decided. And that is very likely, as *Duncan* (I) conflicts with the reasonable overseer analysis used in *Weinbaum v. City of Las Cruces, N.M.*, 541 F.3d 1017 (10th Cir. 2008)[1] and in *Friedman*

[1] *Weinbaum* affirmed two district court decisions: *Weinbaum v. Las Cruces Public Schools*, 465 F. Supp. 2d 1116 (D.N.M. 2006) (upholding Calvary motif crosses in school district emblem) ("*Weinbaum I*") and *Weinbaum v. City of Las Cruces*, *New Mexico*, 465 F. Supp. 2d 1164 (D.N.M. 2006) (same for city seal) ("*Weinbaum II*")

v. Board of County Commissioners of Bernalillo County, 781 F.2d 777 (10th Cir. 1985) (en banc), thus disrupting the uniformity of Establishment Clause jurisprudence within this Circuit.

It also (II) raises a question of exceptional importance because it conflicts with the Supreme Court's decisions in *Van Orden v. Perry,* 545 U.S. 677 (2005) and *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125 (2009).

Furthermore, (III) bereaved survivors, private associations, and public officials are left not knowing how the Establishment Clause applies in this Circuit, and cannot know whether other memorials—such as the fourteen stone crosses honoring fallen federal firefighters near Glenwood Springs, Colorado—must go.

Each factor independently merits review.[2]

THE FACTS OF THE CASE

Thirteen crosses scattered across the far reaches of Utah memorialize thirteen Utah highway patrolmen who died in the line of duty. They were conceived, designed, constructed, funded, erected, and maintained by the private non-profit UHPA and community volunteers. The State of Utah did not design the memorials and UHPA received no public funds for them. Permission to place the private memorials on public property was given where needed by the Utah Department of Transportation (UDOT), but UDOT expressly disclaimed endorsement of the memorials and all legal liability for

[2] En banc review is also uniquely merited because the *Duncan* panel rejected UHPA's argument that federal courts lack subject matter jurisdiction for Establishment Clause claims under 42 U.S.C. 1983 (Slip Op. at 8 n.4) as it was bound by a panel decision in *Green v. Haskell County Board of Commissioners*, 568 F.3d 784, 788 n.1 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1687 (2010). Only the en banc Court can revisit this issue.

them. Slip Op. at 5-8. Three memorials are on private property. (Aplt. App. 1872 ¶ 49; 1873 ¶ 54; 1875 ¶ 60.) Plaintiffs were offended by the presence of each and every memorial, and sued seven years after the first memorial was raised.

Each memorial is a twelve-foot high white steel cross displaying several secular contextual elements: The trooper's name, rank, badge number, and year of death are boldly inscribed on the crossbar. Just below the crossbar, the Utah Highway Patrol beehive logo shows the deceased trooper's professional affiliation. And below that, a plaque bears his image and explains his law enforcement career and how he died. Slip Op. at 5.

But why use a cross? The UHPA chose the cross because it "effectively convey[s] 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."[3] (Aplt. App. 155, ¶ 10.) Its purpose in using a cross, and the state's, were purely secular. Slip Op. at 21.

Importantly, the state affirmatively acted to keep UHPA's private speech private, specifying that UDOT "neither approves or disapproves the memorial marker"; requiring that the UHPA remove a marker if it became a hazard; and insisting that the UHPA bear all legal liability for the markers. (Aplt. App. 2017.)

But why not use some other symbol—an obelisk or tablet? The surviving son of Trooper Doyle R. Thorne explains:

---

[3] The history of the memorials is concisely recounted in the declarations of Lee Perry (Aplt. App. 1864-1910) and Luke Stradinger (*id.* 1911-1915).

> A rock or plaque could not appropriately commemorate my father's legacy. At sixty-five miles per hour, such a marker would symbolize a historical event at best, but would fail to capture my father's humanity and service.
>
> The cross declares that "someone died here." The Trooper's beehive logo declares that that someone was a highway patrol trooper that gave the ultimate sacrifice in protecting and serving his fellow citizens. To me, no other symbol could so appropriately honor my father's sacrifice, service, and dedication to the people of Utah.

(Aplee. Supp. App. 3173 ¶¶ 15-16.) Bluntly, a roadside tablet may memorialize anything—George Washington slept here, Lewis and Clark crossed there, and so on. (Aplt. App. 1868 ¶ 29.) But at a dead minimum, a roadside cross communicates the message, "somebody died here." (*Id.* ¶ 30.)

That reasonable understanding was confirmed within this Court's circuit after fourteen federal firefighters died fighting the South Canyon fire on Storm King Mountain, near Glenwood Springs, Colorado in 1994. Soon thereafter, Robert Mackey, who lost his son Don there, oversaw planting fourteen crosses on the mountain. (Aplt. App. 1921 ¶ 9-15.) He chose to use crosses because they were "such an obvious symbol of death. Anyone who sees the crosses on Storm King knows exactly what they represent—people died on this mountain." (*Id.* ¶ 10.) The crosses are on federal land with the government's permission. (*Id.* 1922 ¶ 17.) Don's cross (*id.* 1926) stands where he died, having turned back into the flaming front to rescue another firefighter. (*Id.* 1920-21 ¶ 7.)

Despite this common understanding of what memorial crosses mean and the multitude of contextual factors confirming the secular purpose and message, UHPA's memorials were held to be "government speech" endorsing Christianity and thus

violating the federal Establishment Clause. Slip Op. at 35.

ARGUMENT

I. *Duncan* conflicts with existing Tenth Circuit precedent in at least five ways.

A. *Duncan's* conflict with *Weinbaum*: reasonability of the observer.

Duncan conflicts with *Weinbaum*, which used the same legal analysis to uphold far more pervasive government use of three crosses styled in the classically Christian motif of Calvary.[4] 541 F.3d at 1022-23. In contrast to barely a dozen crosses scattered across all of Utah, the small city of Las Cruces was saturated with the Calvary cross symbol: it appeared via the city seal on public signs, flags, the city hall and library, police and firefighter uniforms, city vehicles, and myriad official documents. *Id.* at 1025. And it was exhibited on the wall of an elementary school sports center, sculpted in shiny stainless steel, with the dominant 8.396 foot tall center cross flanked by two lesser crosses within a 7.5 foot wide display. *Wienbaum I,* 465 F. Supp. 2d at 1124; see also *id.* at 1158 (photo of sculpture).

Weinbaum nonetheless upheld lavish official use of Latin crosses against an Establishment Clause challenge. It did so because it properly considered the context in which the crosses were used—noting that the city drew its very name from the historic display of crosses, and that those historic crosses merely reflected "secular events" that had occurred near the city. *Weinbaum*, 541 F.3d at 1035.

But therein is the root of conflict, for the Las Cruces crosses, just like the crosses

[4] A mural incorporating the crosses was also challenged and upheld, but not discussed here because the sculpture and seal are more similar to our facts.

in *Duncan*, were memorial crosses: "The more reliable, and widely held, theory holds that the name, Las Cruces, described groups of crosses placed on graves <u>and the sites of massacres</u> that occurred in the area between 1712 and 1840. *Weinbaum II*, 465 F. Supp. 2d at 1172 (emphasis added).

Thus, *Weinbaum* and *Duncan* both arose from the practice of memorializing deaths with crosses at or near the tragic site. *Weinbaum* holds that it is constitutional to perpetuate those displays long after they are gone, and pervasively present them (using the stylized Calvary motif) throughout City government and even as a monumental display on the walls of a public school.

In contrast, *Duncan* held unconstitutional the very act which Las Cruces officially proclaimed and intentionally perpetuated: the display of memorial crosses near the site of tragic death. Such disparate results inject unbearable tension into this Court's Establishment Clause jurisprudence.

Both cases turned on the second part of the test from *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971), where a government action is valid under the Establishment Clause if it (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. The key second element is now presented as whether a reasonable observer "would view the practice as communicating a message of government endorsement." *Bauchman v. West High Sch*., 132 F.3d 542, 551-52 (10th Cir. 1997). More specifically,

the "effect" prong looks through the eyes of an objective observer who is

> aware of the purpose, context, and history of the symbol. The objective or reasonable observer is kin to the fictitious "reasonably prudent person" of tort law. So we presume that the court-created "objective observer" is aware of information "not limited to 'the information gleaned simply from viewing the challenged display.'"

Weinbaum, 541 F.3d at 1031 (citations omitted). Indeed, this observer "is presumed to know far more than most actual members of a given community." *Id.* at n.16.

Such an observer should have little difficulty in seeing a secular message in memorial crosses, particularly when government entities promote traffic safety using crosses. (Aplt. App. 1917 ¶¶ 9-11; 1928-29 ¶¶ 10-12, 16, 19.) And even the atheists admit the point: Mr. Rivers admitted that a cross may mark the locus of death or injury. (*Id.* 1125 lns. 7-9.) Ms. Johnson admitted that crosses may communicate a secular message. (*Id.* 1458 lns. 10-13.) Mr. Clark said the cross is a common symbol of sorrow. (*Id.* 1603 lns. 18-25.) And Mr. Layton admitted that a cross may signify a person's death (independent of religion). (*Id.* 1738, lns. 4-10.)

This points to a fundamental error in *Duncan*, as it broadly rejected any secular use of a cross to signify death because there was "no evidence in the record that the cross has been universally embraced . . . as a memorial for a non-Christian's death." Slip Op. at 29. But if that is the measure, then *Weinbaum* would be wrongly decided. But *Weinbaum* is right, as it used the proper measure of whether an objective observer would understand that a cross can be used to communicate a secular message, not whether a particular message has been "universally embraced."

B. *Duncan's* conflict with *Weinbaum*: purpose and effect.

Further conflict with *Weinbaum* is rooted in inconsistently analyzing purpose and

effect. "Effects are most often the manifestations of a motivating purpose." *Weinbaum*, 541 F.3d at 1033. In *Weinbaum*, the city's purpose in choosing the Calvary motif for its seal and other public works was "indeterminate," although it had offered "various secular justifications for the symbol, including identification of City property and identification with the City's unique historical name." *Id.* Despite an "indeterminate" purpose and only a smattering of *post hoc* justifications, *Weinbaum's* reasonable observer discerned no illicit effects arising from those somewhat shaky facts.

In contrast, in *Duncan* it was utterly undisputed that both the state and the UHPA had purely secular purposes, with no scent of sham purposes to advance religion. Slip Op. at 21-22. And UDOT affirmatively disclaimed both endorsement and legal liability. (Aplt. App. 2017.) Nonetheless, *Duncan* concluded that Christianity was advanced by allowing passive private memorials on public property, and allowing passive private memorials on private property to bear the UHP logo. Slip Op. at 33.

If an observer is to be "reasonable," then he should not attribute illicit religious "endorsement" to UHPA's private displays, when he saw no such effect resulting from the widespread, (often clearly official) displays of Calvary-motif crosses that had less clear purposes in *Weinbaum*. If the Supreme Court finds "no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence," *Van Orden*, 545 U.S. at 684 (plurality) (quoting *Zorach v. Clauson,* 343 U.S. 306 (1952)), then there is no constitutional requirement to suppress private displays which made no effort to expand

religious influence—and which convey a secular message that even the plaintiff atheists confessed is plausible.

C. *Duncan's* conflict with *Weinbaum*: memorializing "secular events."

Roads were dangerous around old Las Cruces. Death stalked the highways, resulting in many crosses memorializing deadly events—sometimes as actual graves, other times marking "the site of tragic deaths." *Weinbaum,* 541 F.3d at 1024. Some that died were no doubt Christians—bishops, priests, even choir boys were slaughtered—others were of indeterminate faith: trappers, travelers, soldiers, and such. *Id.*, n.6. Obviously, one might reasonably infer that some of these memorials were *intended* to convey religious sentiments. But the *Weinbaum* observer focused not on the symbol used, who died, or what they believed, but upon the simple fact of death: The crosses simply "reflect[ed] a series of secular events that occurred near the site of the City." *Id.* at 1035.

In contrast, the *Duncan* observer looks at the identical act of honoring the dead (on both public and private property) by planting a cross near the locus of death. Only in our case, every memorial was secular in purpose and intent; every memorial displays self-explanatory contextual elements; and the state disclaimed endorsement or liability—yet the observer unreasonably transmuted the "secular events" of *Weinbaum* into government religious speech in *Duncan.* This wrongly places more constitutional weight on the atheists' visceral dislike of crosses[5] than is given to the reasonable observer's knowledge of the secular purpose of memorializing a death. *See Gaylor v. United States*, 74 F.3d

[5] As one plaintiff opined, "this is a pretty crappy way to honor state troopers" upon first seeing a fallen trooper memorial. (Aplt. App. 1158 ln. 24-1159 ln. 15.)

214, 217 (10th Cir. 1996).

D. *Duncan's* conflict with *Weinbaum*: self-executing, secular context.

The observer in *Weinbaum* confronted the Calvary motif not only on smallish city seals and school emblems, but also on a monumental scale, where the dominant cross was over eight feet tall. *Weinbaum I*, 465 F. Supp. 2d at 1124. Had there been no other context, the crosses of Las Cruces would likely have fallen. But there was context: encircling the crosses were these words: "Unitas, Fortitudo, Excellentia." From that, the observer (who was evidently bilingual and sports-savvy) deduced that the Calvary motif actually "allude[d] to the Olympic spirit, not to any shrouded religious themes." *Weinbaum*, 541 F.3d at 1037.

In contrast, *Duncan's* observer should have had an easier time of it, where most of his crosses were alongside roads (where even the atheists confess that a cross speaks of death and sorrow) and told their stories in English. For example:

> Trooper Randy K. Ingram
> October 5, 1994
>
> Randy Ingram joined the Utah Highway Patrol in August 1984. He served at the Kanab Port of Entry and later as a field trooper in Fillmore. In 1988 he transferred to Juab County. On October 5, 1994, Trooper Ingram stopped a van occupied by Boy Scouts whose trailer tailights were not working. A semi-truck driver fell asleep, drifted into the emergency lane, and struck Trooper Ingram's patrol car. Proper placement of Trooper Ingram's patrol car saved the lives of the scouts, but cost Trooper Ingram his life as he was killed instantly. The truck driver pleaded guilty to negligent homicide. The stop occurred on Interstate 15 south bound near mile post 207 directly east from where this memorial has been placed.

(Aplt. App. 1873 ¶ 53.) Despite the *Duncan* text explaining the memorial's purpose far more directly than a Spanish allusion to Olympic aspirations, the *Duncan* observer gave it

no weight, thinking he might not be able to read it if he zoomed by at 55 mph on the freeway. Slip Op. at 32 n.14. But that does not explain why the narrative plaques were disregarded when the same observer saw a UHPA memorial while afoot near a UHP office. In that context, only the size of the cross mattered. *Id.* And note also that someone speeding by the elementary school likely could not have read three Spanish words spinning about the crosses, yet that did not defeat their contextual worth in *Weinbaum*. This is not uniform jurisprudence.

E. *Duncan's* conflict with *Friedman*: Utah is not Bernalillo County.

Uniformity in Establishment Clause jurisprudence requires that the reasonable observer must be consistently reasonable. In *Friedman*, it was thought to be reasonable that a person approached by police officers who emerged from patrol cars emblazoned with a cross and the motto (in Spanish), "With This We Conquer," might infer that the officers were "Christian police" and consequently fear faith-related discrimination. 781 F.2d at 782. *Duncan* relies upon *Friedman's* fear to justify felling the UHPA memorials.

Bending *Friedman* to that task is a stretch; it requires the observer to conflate the beehive logo on a police car with a similar logo affixed to a roadside memorial which may be many, many miles away, then infer that the approaching officer is a Christian bent on mistreating him based upon his faith (or lack thereof). Worse, as the officer draws near, the observer will discern that the badge upon the officer's chest is a thinly-disguised Star of David, a symbol with clear religious import. [6]

Now, if the observer of this scene follows *Weinbaum*, then he would reason that

[6] (Aplt. App. 286 (badge)); Slip Op. at 29-30 (Star of David holds religious meaning).

the secular purposes of the distant memorial and proximate badge both have clear contextual elements appended to the respective religious symbols, which resolves any concerns about religious "endorsement." But the *Duncan* observer unreasonably assigned dispositive religious weight to one symbol—the memorial cross—while giving no weight to the religious symbol worn on the chest of an armed police officer.

And while demographics seldom decide constitutional cases, Utah's unique religious composition reinforces how unreasonable the *Duncan* observer was: it is reasonable to think that the state's "endorsement" of the few (seventeen percent) cross-venerating Utahans would likely alienate much of its own police force, given that fifty-seven percent of Utahans are affiliated with the LDS church that does not venerate the cross. (See Aplt. App. 336-337, religious demographics.) An objective observer would reason that the risk of alienation is evidence that the state was not endorsing religion, but rather accommodating what its own police officers did in their private capacity—memorialize the secular event of death. This is all the more true when the crosses specifically identify an individual and disclose his manner of death, just as a typical cemetery cross would do.

II. Conflict with the Supreme Court: *Salazar* and *Summum.*

The need for review is reinforced by *Duncan's* contextual analysis conflicting with the analysis in Justice Breyer's controlling concurrence[7] in *Van Orden v. Perry*, 545 U.S. 677 (2005), in which a plurality of the Court upheld the expressly religious language

[7] Justice Breyer supplied the decisive fifth vote on the narrowest grounds for decision, so his opinion controls under *Marks v. United States,* 430 U.S. 188, 193 (1977).

of the Ten Commandments in a public park. Justice Breyer made clear that the innately religious Ten Commandments also sent a secular moral message. *Id.* at 701. He further noted that the donating private civic group sought to highlight the Commandment's role in combating juvenile delinquency, even while retaining an interest in the religious aspect of the Ten Commandments. *Id.* Even with the retained religious interest, this was "strong" evidence that the monument "conveys a predominantly secular message." *Id.* at 702.

In contrast, the UHPA simply had no religious interest when it chose to use the cross (Aplt. App. 1886 ¶ 105); it was used only to convey the secular message of proximate death (*id.* 1866 ¶ 12). The *Duncan* opinion fails to apply the controlling *Van Orden* concurrence correctly, leaving it in severe tension with this key precedent on public monuments.[8]

The *Duncan* opinion also misapplied *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125 (2009), which held that monuments selectively accepted from private donors by a city and placed within a public park are treated as government speech, when the city normatively took ownership of the monuments. *Id.* at 1133.

The *Duncan* opinion rejected two obvious distinctions between the UHPA memorials and the *Summum* monuments (that the UHPA retained ownership and UDOT

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[8] Justice Breyer heavily weighted the time lapse between monument installation and constitutional challenge as supporting a secular message. That test here militates toward finding the memorials to be constitutional, as seven years elapsed between the first placement in September 1998 (Aplee. Supp. App. 3114 ¶ 25) and the atheists suing in December, 2005 (Aplt. App. 34). *Cf. Green v. Haskell County*, 568 F.3d 784 (10th Cir. 2009) (lapse of a few months before suing over a Ten Commandments monument supported seeing the monument as religious.)

disclaimed endorsement of memorials, Slip Op. at 13-14), because the *Summum* Court's opinion did not impose an affirmative duty on all public monument caretakers to formally adopt private monuments as a condition of treating them as "government speech." Slip Op. at 15. But that duty is irrelevant to our case, where UDOT already voluntarily disclaimed endorsement and all legal liability. (Aplt. App. 2017.) Such intentional government activity fits easily within the limited public forum concept (see UHPA Br. 43-46) but is a prickly fit with the government speech doctrine.

Moreover, *Duncan* completely disregarded the third and dispositive difference between this case and *Summum*: three UHPA memorials are on private property, where there can be no inference of government control, and the sole "official" connection is permitting use of the departmental logo. If *Summum* controls, then the heretofore safe harbor—the headstone cross—is at risk, for both mark the loss of a specific person and differ only in that one marks where the body died and the other, where the body lies. Nor should one assume that any cross may rest in peace, undisturbed by litigation, particularly when the American Atheists' president claims that a uniformed officer who merely attends the funeral of a fallen officer within a church that displays a cross may violate the Establishment Clause. (Aplt. App. 1466 lns. 4-16.)

III. It is unclear how to apply Establishment Clause law within this Circuit.

The muddled state of Establishment Clause jurisprudence leaves a multitude of family survivors, professional colleagues, and public officials uncertain as to whether memorials like the Storm King Mountain crosses must come down. If it was an "important question" to clarify when use of a motor vehicle leads to financial liability, it

is no less an important question to clarify when use of a cross in a private memorial leads to constitutional liability. *See State Farm Mut. Auto. Ins. Co. v. Fisher*, 609 F.3d 1051, 1059 (10th Cir. 2010) (uncertainty of insurers and insured as to application of law was "matter of exceptional importance" meriting certification of question to Colorado Supreme Court).

CONCLUSION

The *Duncan* decision confuses the law, conflicts with appellate and Supreme Court authorities, and inflicts deep emotional injury on the survivors and colleagues who have suffered too much already. Reconsideration can avoid these harms by either of two clear routes: (1) preserving the "government speech" finding while rejecting "endorsement" in light of the memorials' unique setting, extensive self-executing secular context, and unequivocally secular private and public purposes; or (2) treating the memorials as private speech within a limited public forum that is restricted by speaker (private professional associations of public safety officers) and topic (memorializing public servants who fell in the line of duty). We therefore respectfully seek en banc review by this Honorable court.

Respectfully submitted this the 16th day of September, 2010.

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CERTIFICATE OF SERVICE

I, Byron J. Babione, hereby certify that on September 16, 2010, I electronically filed the foregoing document with the clerk of court through the CM/ECF system which will send a copy to the following:

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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 4.5.0.1270, updated on September 16, 2010) and, according to the program, are free of viruses.

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EXHIBITS

Exhibit A: Slip Opinion, *American Atheists, Inc. v. Duncan*, No. 08-4061 (10th Cir. Aug. 18, 2010).

Exhibit B: April 30, 2010 Letter Re: Rule 28(j) supplemental authority in *American Atheists v. Duncan*, No. 08-4061