No. 10-1276

IN THE
Supreme Court of the United States

UTAH HIGHWAY PATROL ASSOCIATION,
Petitioner,
v.
AMERICAN ATHEISTS, INC., ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Should the constitutionality of the Utah Highway Patrolman's Memorials be determined by the text of the First Amendment or by judicially-fabricated tests?

2. Do the Utah Highway Patrol Memorials constitute a "law respecting an establishment of religion"?

3. Should the public arena discriminate against religious expression?

4. Do the memorial crosses have the primary effect of advancing religion?

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae Foundation for Moral Law (the Foundation),[1] is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the inalienable right to acknowledge God. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice system. To those ends, the Foundation has assisted in several cases concerning the public display of the Ten Commandments, legislative prayer, and other public acknowledgments of God.

The Foundation has an interest in this case because the Foundation actively promotes the use in the public arena of symbols that arguably have religious significance for some. Moreover, the Foundation is concerned that government officials

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1 *Amicus curiae* Foundation for Moral Law files this brief with consent from both Petitioners and Respondents, granted with the condition of prior notice. Counsel of record for all parties received timely notice of the Foundation's intention to file this brief, copies of which are on file in the Clerk's Office. Counsel for *amicus* authored this brief in its entirety. No person or entity—other than *amicus*, its supporters, or its counsel—made a monetary contribution to the preparation or submission of this brief.

may be forced to disavow or renounce any "religious purpose" merely to justify the display of religious symbols, leaving the use of religious symbols only to those government officials that have demonstrated indifference, ignorance, or disdain toward them. As the trial court observed, symbols can have multiple meanings. This brief argues that the text of the Constitution should be determinative in this case, and that the use of the cross in the Utah Highway Patrol Association's Memorials does not violate the Establishment Clause of the First Amendment.

SUMMARY OF ARGUMENT

The Utah Highway Patrolman Memorials (Memorials) do not violate the Establishment Clause of the First Amendment because such symbols do not violate the text thereof as it was historically defined by common understanding at the time of the Amendment's adoption. The Memorials are therefore constitutionally unobjectionable.

This Court should exercise judicial authority based on the text of the Constitution from which that authority is derived. A court forsakes its duty when it rules based upon case *tests* rather than the Constitution's *text*. The result of these judicial tests is a modern Establishment Clause jurisprudence that is consistently inconsistent and confusing, and often hostile to religion and its adherents. *Amicus* urges this Court to return to first principles by embracing the plain and original text of the Constitution, the supreme law of the land. U.S. Const. art. VI.

The text of the Establishment Clause states that "Congress shall make no law respecting an *establishment* of *religion*." U.S. Const. amend. I (emphasis added). As applied to this case, the placement of these Memorials is not a law, it does not dictate religion, and it does not represent a form of an establishment. Thus, the decision of the court below should be reversed, based upon the plain meaning of the text of the First Amendment rather than the weak foundation of discordant Establishment Clause precedents.

ARGUMENT

In twenty American cemeteries in France, Belgium, England, Italy, and Luxembourg, a total of approximately 104,366 white crosses stand row after row, commemorating American soldiers who died in World Wars I and II.[2] But if the decision below is allowed to stand, there will be no crosses along Utah highways commemorating patrolmen who died in the line of duty. This is more than a constitutional anomaly. It is a tragic misapplication of the Establishment Clause, dishonoring those who gave their lives to keep our highways safe.

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2 These cemeteries and their rows of crosses may be viewed at http://www.jlday.net/Word_USA_Alphabetical_Apology.htm, and the websites of the American Battle Monuments Commission, http://www.abmc.gov/home.php and http://www.abmc.gov/cemeteries/cemeteries.php (accessed 16 May 2011).

I. THE CONSTITUTIONALITY OF THE UTAH HIGHWAY PATROLMAN'S MEMORIALS SHOULD BE DETERMINED BY THE TEXT OF THE FIRST AMENDMENT, NOT JUDICIALLY-FABRICATED TESTS.

The district court used the wrong test but reached the right conclusion. The 10th Circuit reversed, using the wrong tests to reach the wrong conclusion.

A. The Constitution is the "supreme Law of the Land."

Our Constitution dictates that *the Constitution itself* is the "supreme Law of the Land." U.S. Const. Art. VI. All judges take their oath of office to support *the Constitution itself*—not a person, office, government body, or judicial opinion. *Id.* *Amicus* respectfully submits that this Constitution and the solemn oath thereto are still relevant today and should control, above all other competing powers and influences, the decisions of federal courts.

Chief Justice John Marshall observed that the very purpose of a *written* constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of

government of *courts* …. Why otherwise does it direct the judges to take an oath to support it?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

James Madison, a leading architect of the Constitution, insisted that "[a]s a guide in expounding and applying the provisions of the Constitution . . . . the legitimate meanings of the Instrument must be derived from the text itself." James Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). Justice Joseph Story later succinctly summarized these thoughts on constitutional interpretation:

> [The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged according to common sense, and not by mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840). That same year, this Court confirmed that the constitutional words deserve deference and precise definition: "In expounding the Constitution . . . , every word must have its due force, and appropriate

meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840).

In 2008, this Court reaffirmed the premise that the meaning of the Constitution was not solely the province of federal judges and lawyers:

> In interpreting this text [the Second Amendment], we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."

District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 2788 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

B. The *Lemon* test, the endorsement test, and the *Van Orden/McCreary* compare-and-contrast test, or all of them together, are constitutional counterfeits that contradict and obscure the text of the "supreme Law of the Land."

The district court noted that the *"Lemon* test" of *Lemon v. Kurtzman,* 403 U.S. 602 (1971), is widely used as an analytical framework for analyzing Establishment Clause cases, but added that the test "has been criticized heavily by many, and not all members have adopted the test." *American Atheists v. Duncan,* 528 F. Supp. 2d 1245, 1252 (D. Utah 2007).

Repeatedly, the courts try to cobble together an interpretative rule for Establishment Clause cases, based upon hopelessly inconsistent and illogical Supreme Court decisions and tests instead of using the plain language of the Constitution. The courts' jurisprudential rejection of the First Amendment's text—indeed, the rejection of *any* one firm standard—continues the grand legal march away from the Constitution and into ever-increasing jurisprudential disarray.

The courts' abandonment of fixed, *per se* rules results in the application of judges' complicated substitutes for the law. James Madison observed in *Federalist No. 62* that

> [i]t will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes, that no man who knows what the law is today, can guess what it will be tomorrow.

The Federalist No. 62, at 323-24 (James Madison) (George W. Carey & James McClellan eds., 2001). "What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle." *McCreary County, Ky., v. ACLU of Ky.*, 545 U.S. 844, 890-91 (2005) (Scalia, J., dissenting).

C. The primary effect, if not the purpose, of *Lemon* and other judicial tests is often hostility to the historically important role religion has played in our country.

"There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984); *see also Van Orden v. Perry*, 545 U.S. 677, 686-90 (2005) (listing numerous examples of the "rich American tradition" of the federal government acknowledging God and religion). George Washington declared that, "While just government protects all in their religious rights, true religion affords to government its surest support." *The Writings of George Washington* 432, vol. XXX (1932). Congress affirmed these sentiments in an 1853 Senate Judiciary Committee report concerning the constitutionality of the congressional and military chaplaincies:

> Our fathers were true lovers of liberty, and utterly opposed to any constraint upon the rights of conscience. They intended, by [the First] amendment, to prohibit "an establishment of religion" such as the English church presented, or anything like it. But they had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to send our armies and navies forth to do battle for

> their country without any national recognition of that God on whom success or failure depends; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of "atheistical apathy." Not so had the battles of the revolution been fought, and the deliberations of the revolutionary Congress conducted. On the contrary, all had been done with a continual appeal to the Supreme Ruler of the world, and an habitual reliance upon His protection of the righteous cause which they commended to His care.

Senate Rep. No. 32-376 (1853).

Religious symbolism in government buildings and property abounds across the country, including in the Supreme Court building and courtroom's multiple representations of the Ten Commandments. *See Van Orden*, 545 U.S. at 688. Our nation's capitol is replete with monuments and buildings acknowledging God and religion, including "a 24-foot-tall sculpture, depicting, among other things, the Ten Commandments and a cross" that stands outside a District of Columbia courthouse. *Id.* at 689 & n.9. Cities across the land, and particularly in the West, have names and symbols that reflect the faith of the Spanish and American setters.[3]

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3 *Amicus* notes that row upon row of small white crosses are found in American military cemeteries throughout the world, and within the continental United States graves are marked by white marble slabs, usually with a small cross displayed in the top center, as well as many privately-funded memorials in the

The district court said, citing to *Van Orden,* that "even classic religious symbols may have various meanings and purposes depending on their context," and "the court finds that the memorial crosses at issue communicate a secular message, a message that a UHP trooper died or was mortally wounded at a particular location.," *American Atheists* at 1253. The 10th Circuit did not dispute that conclusion, noting that the Defendants had satisfied the first prong of the *Lemon* test, i.e., that the crosses do serve a secular purpose. *American Atheists v. Duncan*, 616 F.3d 1145, 1158 (10th Cir. 2010).

The American Atheists repeatedly refer to the Memorials in this case as "heroic Roman crosses" and try to argue that the Roman or Latin cross in particular is a symbol of Christianity. However, they have offered no evidence whatsoever that the UHPA chose the Latin cross because of its identification with Christianity or with any particular denomination of Christianity, and the 10th Circuit expressly rejected plaintiffs/appellees' contention that the Latin cross posed special Establishment Clause difficulties. *Id.* at 1157 n.9.

Judicial tests that have departed from the text of the First Amendment, when not merely adding to the confusion that reigns in Establishment Clause jurisprudence, will continue the modern trend of expunging from the public square anything that is remotely religious. It is time for the federal courts to

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shape of crosses.

return to the plain and original text of the First Amendment, which, when applied to this case, supports the conclusion of the district court below that the UHPA Memorials are perfectly constitutional.

II. THE UTAH HIGHWAY PATROL ASSOCIATION MEMORIALS DO NOT CONSTITUTE A "LAW RESPECTING AN ESTABLISHMENT OF RELIGION."

The First Amendment provides, in relevant part, "Congress shall make no *law* respecting an *establishment* of *religion*, or prohibiting the free exercise thereof." U.S. Const. amend I (emphasis added). Even if the Memorials contain a symbol that is considered religious, their placement could not be considered a "law respecting an establishment of religion."[4]

A. The placing of a memorial on a highway does not constitute a "law."

The First Amendment begins with the words, "Congress shall make no law...." Unless the placement of these Memorials is a "law," then it could not violate the text of the Establishment Clause.

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4 *Amicus* will not address herein the compelling argument that the Establishment Clause, with its restriction upon only "Congress," should not be "incorporated" against the states and local governments through the guise of the Fourteenth Amendment. This worthy pursuit is unnecessary to the textual argument raised in this brief.

Shortly before the ratification of the First Amendment, Sir William Blackstone defined a "law" as "a rule of civil conduct . . . commanding what is right and prohibiting what is wrong." 1 W. Blackstone, *Commentaries on the Laws of England* 44 (U. Chi. Facsimile Ed. 1765). Only decades later, Noah Webster's 1828 Dictionary stated that "[l]aws are *imperative* or *mandatory*, commanding what shall be done; *prohibitory*, restraining from what is to be forborn; or *permissive*, declaring what may be done without incurring a penalty." N. Webster, *American Dictionary of the English Language* (Foundation for American Christian Educ. 2002) (1828) (emphasis in original). Alexander Hamilton explained what is and is not a law in *Federalist No. 15*:

> It is essential to the idea of a law, that it be attended with a sanction; or in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will in fact amount to nothing more than advice or recommendation.

The Federalist No. 15 at 72 (Alexander Hamilton) (Carey & McClellan eds. 2001).

In no way can the action of the UHPA erecting a cross by the side of the highway be a "law" establishing religion, even though done with the permission of an administrative (not a legislative) body.

B. The Utah Highway Patrol Association Memorials do not "respect[] an establishment of religion."

The Memorials do not "respect," *i.e.*, concern or relate to, "an *establishment* of *religion*." U.S. Const. amend. I (emphasis added), as those words are properly understood.

1. The definition of "religion"

The original definition of "religion" as used in the First Amendment was provided in Article I, § 16 of the 1776 Virginia Constitution, was quoted by James Madison in his *Memorial and Remonstrance* in 1785, was referenced in the North Carolina, Rhode Island, and Virginia ratifying conventions' proposed amendments to the Constitution, and was echoed by the United States Supreme Court in *Reynolds v. United States*, 98 U.S. 145 (1878), and *Davis v. Beason*, 133 U.S. 333 (1890). It was repeated by Chief Justice Charles Evans Hughes in his dissent in *United States v. Macintosh*, 283 U.S. 605 (1931), and the influence of Madison and his *Memorial* on the shaping of the First Amendment was emphasized in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).[5] In all these instances, "religion" was defined as follows:

> **The duty which we owe to our Creator, and the manner of discharging it.**

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5 Later in *Torcaso v. Watkins*, this Court reaffirmed the discussions of the meaning of the First Amendment found in *Reynolds*, *Beason*, and the *Macintosh* dissent. *See Torcaso*, 367 U.S. 488, 492 n.7 (1961).

Va. Const. of 1776, art. I, § 16 (emphasis added); *see also*, James Madison, *Memorial and Remonstrance Against Religious Assessments*, June 20, 1785, *reprinted in* 5 *Founders' Constitution* at 82; *The Complete Bill of Rights* 12 (Neil H. Cogan ed. 1997); *Reynolds*, 98 U.S. at 163-66; *Beason*, 133 U.S. at 342; *Macintosh*, 283 U.S. at 634 (Hughes, C.J., dissenting); *Everson*, 330 U.S. at 13.

In *Reynolds*, the United States Supreme Court stated that the definition of "religion" contained in the Virginia Constitution was the same as its counterpart in the First Amendment. *See Reynolds*, 98 U.S. at 163-66. The *Reynolds* Court thereby found that the duty not to enter into a polygamous marriage was not religion—that is, a duty owed solely to the Creator—but was "an offense against [civil] society," and therefore, was "within the legitimate scope of the power of . . . civil government." *Id.* In *Beason*, the Supreme Court affirmed its decision in *Reynolds*, reiterating that the definition that governed both the Establishment and Free Exercise Clauses was the aforementioned Virginia constitutional definition of "religion." *See Beason*, 133 U.S. at 342 ("[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.").

Sixteen years later in *Everson*, the Court emphasized the importance of Madison's "great *Memorial and Remonstrance*," which "received strong support throughout Virginia," and played a pivotal role in garnering support for the passage of the

Virginia statute. 330 U.S. at 12. Madison's *Memorial* offered as the first ground for the disestablishment of religion the *express definition of religion* found in the 1776 Virginia Constitution. Thus, the United States Supreme Court has repeatedly recognized that the constitutional definition of the term "religion" is "[t]he dut[ies] which we owe to our Creator, and the manner of discharging [them]." Va. Const. of 1776, art. I, § 16.

As the constitutional definition makes clear, not everything that may be termed "religious" meets the definition of "religion." "A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God." H.R. Rep. No. 83-1693 (1954). For example, from its inception in 1789 to the present, Congress has opened its sessions with prayer, a plainly religious exercise; yet those who drafted the First Amendment never considered such prayers to be a "religion" because the prayers do not mandate the duties that members of Congress owe to God or dictate how those duties should be carried out. *See Marsh v. Chambers*, 463 U.S. 783, 788-789 (1983). To equate all that may be deemed "religious" with "religion" would eradicate every vestige of the sacred from the public square. This Court as recently as 2005 stated that such conflation is erroneous: "Simply having *religious* content or promoting a message consistent with *religious* doctrine does not run afoul of the Establishment Clause." *Van Orden*, 545 U.S. at 678 (emphasis added).

> [Even *Lemon*] does not require a relentless extirpation of all contact between government and religion. Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage, and the Establishment Clause permits government some latitude in recognizing the central role of religion in society. Any approach less sensitive to our heritage would border on latent hostility to religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious.

County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 576 (1989).

Even assuming, *arguendo*, that the UHPA Memorials could in some sense be a "law," their placement could not be considered a law respecting "religion" because, even though the cross is a religious symbol sacred to Christians, the symbol of the cross does not address the *duties* owed to the Creator or the *manner* of discharging those duties. The cross is "religious" to some people, but it is not a "religion," properly defined, to anyone. Moreover, that which constitutes a "religion" under the Establishment Clause must inform the follower not only *what* to do (or not do) but also *how* those commands and prohibitions are to be carried out. A symbol of the cross does neither and thus cannot be considered a "religion."

Even if the facts in this case showed that the Memorials placed on the highways for religious reasons, *e.g.*, by Christian citizens who wanted to recognize their faith in Jesus Christ, the symbol would still not rise to the level of a "religion." A religious symbol displayed on government property with a religious purpose still does not a religion make. The UHPA Memorials do not meet the constitutional definition of the term "religion."

2. The definition of "establishment"

The UHPA Memorials also do not represent an "establishment" of religion in the State of Utah. If the State of Utah were to establish a religion, it seems likely that it would establish the religion held by the majority of Utah residents. As the district court recognized and as the briefs of the various parties have observed, the religious affiliation of residents of the State of Utah is about 57% Church of Jesus Christ of Latter Day Saints (LDS). If the State of Utah were to establish a religion, it defies logic and common sense to think the State would do so by adopting a symbol that is not used by LDS churches or people.

At the time the First Amendment was adopted in 1791, "five of the nation's fourteen states (Vermont joined the Union in 1791) provided for tax support of ministers, and those five plus seven others maintained religious tests for state office." Mark A. Noll, *A History of Christianity in the United States and Canada* 144 (1992). To avoid entanglements with the states' policies on religion and to prevent

fighting among the plethora of existing religious sects for dominance at the national level, the Founders, via the Establishment Clause of the First Amendment, sought to prohibit Congress from setting up a national church "establishment." *See, e.g.*, Story, *A Familiar Exposition*, *supra,* § 441 (Establishment Clause cannot be attributed to "an indifference to religion in general, especially to Christianity, (which none could hold in more reverence, than the framers of the Constitution)").

An "establishment" of religion, as understood at the time of the adoption of the First Amendment, involved "the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others." Thomas M. Cooley, *General Principles of Constitutional Law*, 213 (Weisman pub. 1998) (1891). For example, in Virginia, "where the Church of England had been established [until 1785], ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches." *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 52 (2004) (Thomas, J., concurring in the judgment). In the congressional debates concerning the passage of the Bill of Rights, James Madison stated that he "apprehended the meaning of the [Establishment Clause] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to

worship God in any manner contrary to their conscience." 1 *Annals of Cong*. 757 (1789) (Gales & Seaton's ed. 1834). Justice Joseph Story explained in his *Commentaries on the Constitution* that "[t]he real object of the amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an [sic] hierarchy the exclusive patronage of the national government." 2 Joseph Story, *Commentaries on the Constitution* § 1871 (1833).

The House Judiciary Committee in 1854 summarized these thoughts in a report on the constitutionality of chaplains in Congress and the army and navy, stating that an "establishment of religion"

> must have a creed defining what a man must believe; it must have rites and ordinances which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rights; it must have tests for the submissive, and penalties for the non-conformist. *There never was an established religion without all these*.

H.R. Rep. No. 33-124 (1854) (emphasis added). At the time of its adoption, therefore, "establishment involved 'coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.'" *Cutter v. Wilkinson*, 544 U.S. 709, 729 (2005) (Thomas, J., concurring) (citations omitted).

Like the inscription of the motto "With God All Things Are Possible" on the Ohio Statehouse, the erection of UHPA Memorials

> involves no coercion. It does not purport to compel belief or acquiescence. It does not command participation in any form of religious exercise. It does not assert a preference for one religious denomination or sect over others, and it does not involve the state in the governance of any church. It imposes no tax or other impost for the support of any church or group of churches.

ACLU of Ohio v. Capitol Sq. Review and Advisory Bd., 243 F.3d 289, 299 (6th Cir. 2001) (*en banc*).

The often overlooked word "establishment" in the First Amendment was meant by the Founders to communicate the idea of a compulsory and state-sponsored religious orthodoxy on a comprehensive level. Just as the Utah State Highway Patrol logo on the Memorial does not enforce the official orthodoxy of state-worship, so the cross in the Memorial does not enforce the worship of Jesus Christ. The UHPA Memorials do not violate the Establishment Clause because they do not create, involve, or concern an "*establishment* of religion."

III. THE PUBLIC ARENA MUST NOT DISCRIMINATE AGAINST RELIGIOUS EXPRESSION.

America's commitment to freedom of expression is based in large part upon the belief that truth is most likely to win out in competition in the marketplace of ideas. *Abrams v. United States*, 250 U.S. 616, 630

(1919) (Holmes, J., dissent); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967). *Keyishian* further recognized that "The classroom is peculiarly the 'marketplace of ideas.'" *Id.* at 605-06.

Widmar v. Vincent, 454 U.S. 263 (1981), held that a state university may not discriminate against religious expression by making its meeting rooms available to nonreligious organizations but not to religious organizations. A similar principle applies to other forms of government property except closed forums such as jails or military reservations.

In the 210 years since the ratification of the First Amendment, the public arena has expanded exponentially. At that time schools were mostly private or parochial; now public schools and universities are the norm. At that time, except in cities and towns, roads were relatively few and often privately owned; today public streets, roads and highways interlace the nation. Add to this public parks, theaters, coliseums, museums, office buildings, national forests, public radio and television, and a host of other publicly-owned entities, and we find that the public arena has become the primary arena for the exchange of ideas.

The marketplace of ideas involves competition among many ideas—some religious, some secular, some a combination of both. Sometimes religious ideas compete with other religious ideas; sometimes they compete with secular ideas. Sometimes they involve alternative explanations, approaches, or solutions to the same underlying problems.

If government gives secular expression full access to the public arena, but restricts or prohibits religious expression in the public arena, then government has placed religious ideas at a distinct disadvantage. This has always been true, but the more the public arena expands, the more severe this disadvantage becomes.

A policy that allows display of purely secular symbols on public highways but prohibits display of a cross, constitutes the hostility to religion Justice Clark warned of in *Abington Township v. Schempp*, 374 U.S. 203, 294 (1963), when he said, "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion."

The effect of the 10th Circuit's decision is blatant discrimination against the public display of symbols that may have religious meaning. If the UHPA had chosen to memorialize patrolmen by erecting a flag, or an eagle, or an elk, or a seagull, or a sego lily, these would be deemed permissible. But a cross, because it has religious meaning for some, is prohibited. In the marketplace of ideas, this places ideas that have religious connotations at a distinct disadvantage.

The UHPA Memorials may or may not be religious expression, but they are a form of expression. We respectfully urge the Court not to interpret the First Amendment in a way that places certain forms of expression at a disadvantage simply

because that expression employs symbols that have a religious origin or meaning for someone.

Amicus does not agree with the 10th Circuit's conclusion that the crosses constitute "government speech" and therefore free speech and free exercise rights and interests do not apply. The crosses are erected by private individuals working as a private association at private expense. The program was initiated by private individuals, the Association and the bereaved families select the symbols their location, and the crosses are maintained by private individuals and associations. Nothing in this program prohibits other individuals or associations from erecting other symbols beside Utah state highways. Simply calling these memorial crosses "government speech" cannot be a shield to avoid the free speech and free exercise problems incurred by prohibiting their use.

IV. THE MEMORIAL CROSSES DO NOT HAVE THE PRIMARY EFFECT OF ADVANCING RELIGION.

Amicus asserts that the *Lemon* test is not grounded in the Establishment Clause and is not an appropriate test for Establishment Clause cases. Nevertheless, if the Court chooses to apply the *Lemon* test to this case, the Court should rule for Defendants/Appellants because (1) the 10th Circuit acknowledged that the memorial crosses serve a secular purpose, and (2) the memorial crosses do not have the primary effect of advancing religion.

The 10th Circuit concluded that the memorial crosses have the primary effect of advancing religion, because an informed observer would perceive the memorial cross as a government endorsement of the Christian religion. *American Atheists*, 616 F.3d at 1164. As the 10th Circuit said, quoting the 9th Circuit in *Buono v. Norton,* 371 F.3d 543, 550 (2004), "'How much information we will impute to a reasonable observer is unclear.'" *Id.* at 1159. But surely this informed observer would be aware that U.S. military cemeteries overseas contain rows upon rows of white crosses marking soldiers who have died, and that Arlington and other U.S. military cemeteries within the United States contain rows upon rows of white markers upon which crosses are prominently displayed. Surely this informed observer would be aware that after someone dies in a traffic accident, that person's family often erects a cross by the side of the road where the accident occurred. Surely the observer would not assume that everyone who placed a cross on the grave of a loved one or at the scene of a fatal accident was making a statement that the deceased was a Christian.

This informed observer would also be aware that the symbol of the cross is used in many other ways. For example, the American Red Cross and the International Red Cross both use a red cross as the symbol of their organizations and their readiness to help in time of need, that at one time the red cross may have been used as a symbol because of the organization's roots in Christian charity but it is now perceived more as a symbol of willing assistance, and

it is even recognized in Article 7 of the 1864 Geneva Convention, Chapter VII, and Article 38 of the 1949 Geneva Convention as a symbol of neutral aid that belligerents of all sides should respect.

This informed observer would also be aware, having observed the symbols on fire department buildings and vehicles, that the Maltese cross is known around the world as the symbol of fire services,[6] and that the Utah State Fire Marshall Office uses as its symbol a Maltese cross with a red image of the State of Utah in its center.[7]

The informed observer, then, would be aware that the cross is often used other than as a religious symbol, signifying death, especially the death of a soldier or other uniformed public servant, and of brave and selfless service to others.

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6 This website, http://www.smartplanet.com/blog/intelligent-energy/jaguar-8217s-green-flash/6050?tag=nl.e550 (accessed May 10, 2011), displays hundreds of Maltese cross images that have been adapted by various fire departments. The Maltese cross came to be associated with fire protection during the Crusades, when the Knights of St. John (later the Knights of Malta) risked their lives to save others from fiery glass missiles hurled upon them by their Muslim opponents.

7 Available at http://publicsafety.utah.gov/firemarshal/ (accessed May 10, 2011).

The informed observer therefore would not perceive the memorial cross as state endorsement of the Christian religion, especially in the State of Utah where the majority religion does not use the cross as a religious symbol. The 10th Circuit goes to great lengths to demonstrate that it is possible for a symbol to be perceived as state endorsement of a minority religion. *Amicus* responds that, even if that is possible, it is much less likely, and the 10th Circuit has failed to demonstrate that the memorial crosses are so perceived in the State of Utah.

CONCLUSION

"When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, [the courts] should not hesitate to resolve the tension in favor of the Constitution's original meaning." *Kelo v. City of New London, Conn.*, 545 U.S. 469, 523 (2005) (Thomas, J., dissenting). Such a clash exists in this case between the never-amended words of the Establishment Clause on the one hand and the ever-changing Establishment Clause jurisprudence on the other. The proper solution is to fall back to the foundation, the text of the Constitution.

The issue of religious symbols on public property arises over and over again in all parts of this country. The decisions of lower courts have been mixed, partly because this Court has sent mixed signals in *Stone v. Graham, Lynch, Allegheny, Capitol Square, McCreary, Van Orden, Pleasant Grove v. Summum,*

and other cases. Courts, governmental entities, churches, organizations, and individuals are confused, do not know what is and is not permissible, and are looking to this Court for guidance.

For the reasons stated, this Honorable Court should grant petitioner's writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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