Nos. 10-1276 and 10-1297

In the Supreme Court of the United States

UTAH HIGHWAY PATROL ASSOCIATION, PETITIONER

v.

AMERICAN ATHEISTS, INC., ET AL.

LANCE DAVENPORT, ET AL., PETITIONERS

v.

AMERICAN ATHEISTS, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE BECKET FUND FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether roadside memorials on government property constitute government speech when those memorials are privately initiated, privately designed, privately funded, privately erected, privately owned, and privately maintained, and when the government has expressly disclaimed any intent to approve their message.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

Because religion—like race, ethnicity, art, or music—is a fundamental aspect of human culture, the Becket Fund opposes attempts to use the Establishment Clause to banish acknowledgement of religion from the public square. It has litigated numerous Establishment Clause cases before the Federal Courts of Appeals and this Court, and litigated this case before the Court of Appeals below.

Before the Tenth Circuit, the Becket Fund filed an *amicus* brief in support of Petitioners on its own behalf and on behalf of four Tenth Circuit States—Colorado, Kansas, New Mexico, and Oklahoma. The Becket Fund argued the case to the panel. On petition for rehearing, the Becket Fund filed another *amicus* brief on its own behalf and on behalf of the States of Colorado, Kansas, Oklahoma, and Wyoming.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certify that no part of this brief was authored by counsel for any party, and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief. The brief is filed with the consent of all parties, whose consent letters have been lodged with the Clerk.

The Becket Fund is particularly concerned that the panel's unprecedented expansion of the government speech doctrine, combined with its problematic application of the Endorsement Test, would render many forms of private religious speech unconstitutional, thus discouraging state and local governments from permitting private religious speech on government property.

SUMMARY OF THE ARGUMENT

The government speech doctrine is a narrow one. According to the rule adopted by this Court just three terms ago in *Pleasant Grove City* v. *Summum*, displays on public property are not government speech unless the government selects the displays, accepts them, takes ownership, and makes them permanent. In brief, the speech belongs to the government only when the government controls the speech.

That was the rule, until this case. In a startling departure from this Court's precedents, the Tenth Circuit below adopted an entirely different approach. It held that *any* time a government entity permits a private party to erect a display on public land, the display belongs to the government. Thus *any* memorial, monument, or structure on public property is, according to the Tenth Circuit, government speech—even if it is not permanent, not selected by the government, not accepted by the government, not owned by the government, and not maintained with public funds.

This result is directly contrary to the Court's decision in *Summum*. And its implications are far-reaching. The opinion below converts all manner of

private displays, including private and non-permanent works of art, privately placed roadside remembrances, and even the cross at Ground Zero, into government speech. And because no other circuit has interpreted *Summum* in this fashion, there is now one rule governing the constitutional status of public displays in the Tenth Circuit and a different rule in every other jurisdiction in the Nation.

The Tenth Circuit's dramatic expansion of the government speech doctrine also distorted its Establishment Clause analysis. While this Court's cases have held that the Endorsement Test does not apply to purely private speech on public property or to passive public displays, the Tenth Circuit applied the Endorsement Test anyway, based entirely on its holding that the roadside memorials here constituted government speech. The outcome was a judgment in conflict with this Court's precedents and the prevailing rule in every other circuit.

Only this Court can defend its precedents, restore uniformity, and define the proper scope of the government speech doctrine. This Court's intervention is required.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit's opinion constitutes an unprecedented expansion of the government speech doctrine contrary to this Court's decision in *Pleasant Grove City* v. *Summum*.

This Court has held that public speech will be treated as the government's own only in rare circumstances: when the government "sets the overall message to be communicated and approves

every word" conveyed to the public, *Johanns* v. *Livestock Marketing Ass'n*, 544 U.S. 550, 562 (2005), or when the government exerts editorial control over private speech and uses the speech to communicate a government message, see *Rust* v. *Sullivan*, 500 U.S. 173 (1991) (government use of private speakers to promote a government policy is government speech); *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995) (same).

In *Pleasant Grove City* v. *Summum*, 129 S. Ct. 1125 (2009), the Court applied these principles to monuments displayed on public land. The Court held that such monuments will count as government speech if they are (1) permanent, see *id.* at 1132, 1134; (2) "selected" by the government, *id.* at 1134; (3) "accepted" by the government, *id.* at 1133, 1134; (4) owned by the government; and (5) maintained by the government, see *id.*

The displays at issue in this case meet precisely *none* of those criteria, yet the Tenth Circuit still ruled that they were government speech. See UHPA Pet. 14a-18a. That was more than mere error. It was a startling doctrinal innovation without support in this Court's precedents and with far-reaching practical consequences. This Court has warned that "startling innovation[s] . . . should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent." *Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U.S. 263, 270 (1965). Neither is present here. Under the standards so recently articulated by this Court in *Summum*, the roadside displays at issue in this case are private speech, not government speech. The Tenth Circuit's speech analysis and its resulting

Establishment Clause holding were fundamentally mistaken.

1. The memorial displays do not qualify as government speech according to the criteria adopted in *Summum*. To begin with, the displays are not truly permanent. Because they have at all times belonged to the Utah Highway Patrol Association ("the Association"), they can be removed by the Association at any time, without notice and without government permission. Unlike the Ten Commandments monument in *Summum*, see 129 S. Ct. at 1129-30, these roadside memorials were not donated for display in perpetuity. In fact, they were not donated at all. They belong to the Association, not the government, and are removable at will.

Second, the government did not "select" or "accept" the displays. The failure of the government to affirmatively choose the roadside memorials or otherwise edit their content means the government has not controlled the memorials' message. And that means the memorials cannot be government speech.

This Court has held that the government speaks when it crafts its own message, see *Johanns*, 544 U.S. at 560 ("[the] message set out in the beef promotions is from beginning to end the message established" by the government), or when it exercises editorial control over private speech and makes that speech available to the public, see *Rosenberger*, 515 U.S. at 833 (government speaks when it "use[s] private speakers to transmit specific information pertaining to its own program" and to "promote a particular policy of its own").

Summum synthesized these principles by holding that "privately financed and donated monuments that the government *accepts* and *displays* to the public" constitute government speech. 129 S. Ct. at 1133 (emphases added).[2] In *Summum*, Pleasant Grove City admitted that it carefully "select[ed] those monuments that it want[ed] to display for the purpose of presenting the image of the City that it wish[ed] to project." 129 S. Ct. at 1134. By choosing which privately donated monuments to accept and which to reject, the City "effectively controlled the messages sent by the monuments in the park." *Id.* (internal quotation marks omitted).

The contrast with this case could not be starker. The State of Utah did not select or accept the roadside memorials. Quite the opposite. All parties admit that the Utah Department of Transportation "took no part in designing or selecting the memorial cross[es]." UHPA Pet. 45a (undisputed facts). What is more, the State expressly *disclaimed* endorsement of the displays' message when it granted the Association permission to erect the memorials: the State, the permit stressed, "neither approves [n]or disapproves the memorial marker[s]." UHPA Pet. 128a. In short, the State of Utah made no editorial decisions, accepted nothing from the Association, endorsed nothing, and generally went out of its way

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[2] Though the message the government conveys as a displayer of artwork and the message intended by the original author can be quite different ones. See *Summum*, 129 S. Ct. at 1136 & n.5 ("By accepting a privately donated monument and placing it on city property, a city engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument's donor or creator.").

to make clear that it exercised no control over the message the displays contained.

These memorials are not government speech under *Summum* for a final reason: the government has at no time owned or maintained the displays. Indeed, once again, it expressly *disclaimed* ownership. In the permit authorizing the Association to erect the memorials, the Utah Department of Transportation noted that while it "remain[ed] the owner of the real property on which said landscape facilities were installed," it did not own the displays themselves—nor would it maintain them. UHPA Pet. 128a-129a. And it is undisputed that no State monies have ever been expended on the displays. See UHPA Pet. 45a (undisputed facts). Rather, the Association erected the displays itself and maintains them itself, with its own resources. At least one of the monuments still stands on private, not government, property. See UHPA Pet. 9a.

The displays in this case are not permanent, were neither selected nor accepted by the government, are not owned by the government, and are not maintained with government funds. Thus the government has not "se[t] the overall message to be communicated." *Johanns*, 544 U.S. at 562. It has not exercised editorial authority over any message. See *Rosenberger*, 515 U.S. at 833. It has merely permitted private speech on its property. According to *Summum*—and the government speech cases it applies—that is not sufficient to make this speech government speech.

2. But the Tenth Circuit swept *Summum* aside, holding that its rules do not apply to this case. The court's attempts to avoid that controlling precedent

are strained, to say the least. In the end, they amount to a simple refusal to apply this Court's instruction.

The Tenth Circuit began its effort at distinction by acknowledging that the State does not own the roadside displays—as indeed all parties admit. See UHPA Pet. 16a. But it promptly dismissed that undisputed fact as irrelevant, on the theory that some of the monuments displayed in *Summum* may not have been government-owned, either. See UHPA Pet. 16a. The panel's speculation is wholly without support in this Court's opinion and wholly contrary to fact. It was *undisputed* in *Summum* that "[t]he city own[ed] and control[led] all of the items" in the park. Pet. for Writ of Certiorari 5, *Pleasant Grove City* v. *Summum*, 555 U.S. 460 (2009) (No. 07-665); see also Declaration of Frank Mills, *Summum* v. *Pleasant Grove City*, No. 2:05-cv-00638-DAK, Dkt. No. 19-3 (D. Utah, filed Nov. 14, 2005) (describing monuments in Pleasant Grove City as either donated to or created by the city).

Moreover, while the Tenth Circuit opined that ownership "does not materially affect" the constitutional analysis, UHPA Pet. 16a, the *Summum* Court found ownership quite relevant. It repeatedly pointed out that the Ten Commandments monument was owned by the City. See, *e.g.*, 129 S. Ct. at 1132, 1133, 1134. And it explained the significance of this fact: by "t[aking] ownership of th[e] monument and put[ting] it on permanent display," Pleasant Grove City signaled "unmistakably . . . to all Park visitors that the City intend[ed] the monument to speak on its behalf." *Id.* at 1134. There is no such ownership here, and thus

no intention on the part of the government that the roadside displays speak for the State.

Next, the Tenth Circuit reasoned that the roadside memorials counted as government speech because the government *permitted* them to appear on government property. See UHPA Pet. 17a. But that holding conflates government *permission* to display an object with government *selection*, *acceptance*, and *adoption* of the object's message.

This Court has never made such an equation. On the contrary, the Court has consistently refused to apply the government speech doctrine where the government is not "responsible for [the] content" of the message. *Bd. of Regents* v. *Southworth*, 529 U.S. 217, 229 (2000); see also *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 548 (2001) (no government speech where there is "no programmatic message" crafted or claimed by the government).

In *Summum*, the Court did not rely on the mere display of the Ten Commandments monument on government land; it found the government's *selection* and *acceptance* of the monument dispositive. The Court repeatedly emphasized that the City had "accept[ed]" the monument, 129 S. Ct. at 1133, 1134; had "exercise[ed] final approval authority over [the] selection," *id.* at 1134 (internal quotation marks omitted); and had adopted a specific policy for "select[ing] those monuments that it wants to display" in the future, *id.* This deliberate selection and acceptance, the Court concluded, amounted to the creation of a distinct government message and "a more dramatic form of adoption than [any] sort of formal endorsement." *Id.*

There has been no similar selection or adoption here. Once again, it is undisputed that the State of Utah did not design the roadside memorials or select them for display. See UHPA Pet. 45a (undisputed facts). And it is undisputed that the State expressly declined to endorse their message. UHPA Pet. 128a. The State has thus exercised no control over the memorials and cannot be held "responsible for [their] content." *Southworth*, 529 U.S. at 229.

The Tenth Circuit's redesigned version of the government speech doctrine has far-reaching consequences. Because the court found that mere permission to display is equivalent to government endorsement, *all* displays on public land are presumptively government speech under the Tenth Circuit's approach. That includes scores of familiar items that have never before been treated as government speech, including the "plaque[s], monument[s], or similar object[s]" the State of Colorado allows private citizens to place on "county road[s] to commemorate one or more people who died" there. C.R.S. § 43-2-149(1)(a), (3) (2004). It includes *descansos* in New Mexico, traditional privately-maintained roadside memorials often in the shape of a cross, which New Mexico law protects from defacement. See N.M.S. § 30-15-7 (1978). The Tenth Circuit's rule sweeps in crosses placed in public by private parties, but see *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753 (1995) (cross privately placed on government property not government speech), and commercial newsracks set up in public locations, but see *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 424-425, 430-431 (1993) (permanent newsracks on public property are private speech).

The rule would even prohibit display of the "Ground Zero Cross"—a privately owned artifact—at the World Trade Center Memorial—a privately owned building—because the land on which the Memorial rests is owned by the New York/New Jersey Port Authority. See Mark Di Ionno, *Ground Zero Cross to be Memorialized*, Springfield State Journal-Register, May 7, 2011.

Of course, no other court has ever held that such items qualify as government speech. In fact, this Court and others have treated objects like the above as *private* speech. The Tenth Circuit's rule thus brings it into conflict with this Court's precedents and every other circuit in the Nation.

3. The Tenth Circuit's unprecedented expansion of the government speech doctrine directly informed and distorted its Establishment Clause analysis. Because the court treated the roadside memorials as government speech, it applied the so-called Endorsement Test. See UHPA Pet. 19a. Had it followed this Court's instructions and acknowledged the roadside memorials as the private speech they are, however, the Establishment Clause analysis would have been entirely different.

A plurality of this Court has held that the Endorsement Test does not apply to private speech on government property, except in the rare case that the government deliberately manipulates the forum to favor private religious speech. See *Pinette*, 515 U.S. at 766 (plurality opinion). As the *Pinette* plurality explained, the Establishment Clause "has never been read by this Court to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in

a public forum." *Id.* at 767. That holding bears directly on this case. The private speech here is not religious in purpose, see UHPA Pet. 46a (undisputed facts) ("The UHPA did not intend to convey a religious message . . . ."), and it has received no special treatment from the government. Indeed, all parties agree that the State has from the first disclaimed any connection with the speech and any responsibility for it. See UHPA Pet. 45a (undisputed facts) ("The Utah Department of Transportation . . . took no part in designing or selecting the memorial cross.").

But further, as Petitioners explain, see Utah Pet. 12-13; UHPA Pet. 14, this Court has held that the Endorsement Test does not apply to passive displays, which must instead be evaluated with a fact-sensitive inquiry centered on the total "context of the display," *Van Orden* v. *Perry*, 545 U.S. 677, 701 (2005) (Breyer, J., concurring). That the speech in question here was privately designed, privately funded, privately erected, and privately maintained bears directly on the "fact-intensive" approach *Van Orden* prescribes. *Id.* at 700. But the Tenth Circuit did not make that inquiry. Instead, it applied its own idiosyncratic version of the Endorsement Test, see UHPA Pet. 84a-95a (Kelly, J., dissenting from denial of rehearing en banc), without considering the roadside displays' private character or "how the text of the memorials is used" in the total context. *Van Orden*, 545 U.S. at 701.

The Tenth Circuit's mistaken Establishment Clause analysis was premised squarely on its aggressive reinterpretation of the government speech doctrine. The result is as unprecedented as it is

mistaken. The Tenth Circuit has interpreted the government speech doctrine as no other court has and declared unconstitutional commonplace roadside displays that no other court would. As Judge Gorsuch put it in his dissent from the denial of rehearing en banc, "Where other courts permit state laws and actions to stand, [the Tenth Circuit] strike[s] them down." UHPA Pet. 101a. This Court's intervention is required.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be granted.

Respectfully submitted,

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MAY 19, 2011